Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of *Parents Involved*

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In 2007, an unprecedented event took place. Never before had the United States Supreme Court pitted two civil rights victories against each other to produce a high-profile defeat for advocates of school integration. Yet, this is precisely what happened in *Parents Involved in Community Schools v. Seattle School District*[1] when the Justices struck down voluntary desegregation plans in the public schools of Louisville, Kentucky and Seattle, Washington. To reach this result, the Court ironically turned to *Brown v. Board of Education*[2] and *Grutter v. Bollinger*,[3] both of which had supported integration in education. In *Brown*, the Court famously declared in a unanimous opinion that "[s]eparate educational facilities are inherently unequal."[4] Admittedly, in the years that followed, *Brown*'s clout was undermined by ceaseless battles over how its lofty rhetoric would be implemented, even as its iconic status grew. Some saw the decision as endorsing a normative ideal of colorblindness, while others insisted that *Brown* recognized that race-consciousness was necessary to undo longstanding patterns of segregation, subordination, and stratification. As constitutional law scholar Reva Siegel has observed, *Brown*'s legacy was far from preordained, and "racial conflict has shaped the path and form of the decision's canonization."[5]

By the time that *Grutter* came before the Court in 2003, there were serious doubts about the future of race-conscious government decision-making even when used to promote policies of access and integration. So, when the Justices upheld the use of race in the University of Michigan Law School's admissions process, activists hailed the decision as a much needed

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[1] 127 S. Ct. 2738 (2007).

[2] 347 U.S. 483 (1954).

[3] 539 U.S. 306 (2003).

[4] 347 U.S. at 495.

[5] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1477 (2004).

shot in the arm for the civil rights movement.[6] In short order, advocates predicted that *Grutter* would provide the basis for upholding voluntary school desegregation plans in public elementary and secondary schools.[7] Yet, far from being the sword that reinvigorated the integrationist ideal, *Grutter* became the shield that blocked race-based student assignment plans.

How did a case about diversity come to play a part in undoing voluntary desegregation? This seemingly paradoxical result was born of a jurisprudence of fragmentation that has manifested itself doctrinally in at least three ways. First, *Brown* has been appropriated in the service of competing agendas and so has become a decision at war with itself. The case is invoked on all sides to support flatly contradictory interpretations of what the Equal Protection Clause signifies. According to these warring accounts, *Brown* alternatively means that strict colorblindness is the constitutional norm or that flexible, color-conscious remedies are absolutely essential to do racial justice.

Second, the school desegregation cases have proceeded on an entirely different logic from higher education decisions that address affirmative action in admissions. In implementing *Brown*, the Court focused on rectifying past discrimination by school officials. Meanwhile, in public colleges and universities, the Court recognized a diversity rationale that has nothing to do with corrective justice and instead turns on the cosmopolitan exchange of ideas among people with a range of backgrounds and experiences. These two lines of authority have co-existed, unreconciled and disconnected, until they collided in *Parents Involved.*

Third, cases involving race and equality have been highly compartmentalized, so that the Court adopts different doctrinal strategies depending on whether education, employment, government contracting, or voting is involved. Again, these distinct approaches often seem to inhabit parallel universes so that affirmative action can survive in colleges and universities, even as it is struck down in government contracting. Or, race-conscious remedies can persist in voting rights jurisprudence while they come under siege in school desegregation cases.

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[6] *See, e.g.*, David G. Savage, *Court Affirms Use of Race in Admissions*, L.A. TIMES, June 24, 2003, at 1; Stephen Magagnini & Michael Doyle, *Supreme Court Upholds Using Race in School Entry*, SAC. BEE, June 24, 2003; Greg Gordon & Mary Jane Smetanka, *Issues of Race and Access; Race Retains Limited Role in College Admissions*, STAR TRIBUNE, June 24, 2003, at 1A.

[7] Caroline Hendrie, *In U.S. Schools, Race Still Counts; Despite Progress, Challenges Loom*, EDUC. WEEK, Jan. 21, 2004, at 1, 18. Indeed, this strategy led to an important early success in *Comfort v. Lynn School Committee*, 418 F.3d 1, 17 (1st Cir. 2005). John Gehring & Caroline Hendrie, *Advocates Hail Ruling Backing Desegregation Plan*, EDUC. WEEK, July 13, 2005, at 3.

As *Parents Involved* demonstrates, this fragmentation has led to contradiction and confusion in our country's equal protection jurisprudence. All of the Justices in the voluntary school desegregation cases claimed to be the authentic interpreters of *Brown*'s legacy, and there was open acrimony over which of them was betraying the landmark decision. Amid this conflict, the Court appeared incapable of charting a decisive course for social justice in a racially complex world. Indeed, as I will show, the Justices were hamstrung by a contestation between colorblind and color-conscious interpretations of the Constitution that left little room for a dynamic and flexible account of race. Despite the setbacks, *Parents Involved* offers an important opportunity to reflect on how the Court can remain relevant by acknowledging that equality is integrally linked to the freedom to forge distinct identities in a diverse society.

I. WHEN EQUALITY CLAIMS COLLIDE: DESEGREGATION AND AFFIRMATIVE ACTION IN *PARENTS INVOLVED*

When the Court deliberated over whether to hear *Parents Involved*, the parties framed the question for review as whether *Grutter v. Bollinger* could be used to uphold the voluntary desegregation plans in Louisville and Seattle.[8] In *Grutter*, Justice Sandra Day O'Connor's majority opinion upheld an admissions policy that weighed race as one factor in determining who would be admitted to the University of Michigan Law School.[9] Building on Justice Lewis Powell's reasoning in *Regents of the University of California v. Bakke*,[10] she found that diversity was a compelling interest and that democratic legitimacy was advanced by broad access to pathways of

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[8] Petitioner's Brief at i, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908); Brief of Petitioner at i, Meredith v. Jefferson County Bd. of Educ., 127 S. Ct. 2738 (2007) (No. 05-915); Brief for Respondents at i, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908); Brief for Respondents at 21, 24–27, 29–30, 36–44, 49, Meredith v. Jefferson County Bd. of Educ., 127 S. Ct. 2738 (2007) (No. 05-915). *See also* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 325 (2008); David G. Savage, *Ever True to Brown? Two Public School Cases Raise the Legacy of the Famed Desegregation Ruling*, 92 A.B.A. J. 16, 17 (2006). Although the parties focused on *Grutter*'s implications, the NAACP Legal Defense and Educational Fund contended in its amicus brief that strict scrutiny was inapposite because voluntary school integration was not a form of affirmative action like that used in higher education admissions. Instead, a rigorous rational basis scrutiny standard should apply to the Louisville and Seattle plans. Brief of the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Respondents at 2–9, 19–23, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908 and 05-915).

[9] 539 U.S. at 334.

[10] 438 U.S. 265 (1978).

leadership in elite public institutions.[11] Although the majority opinion permitted affirmative action to survive, O'Connor was careful to respect Powell's caveat that programs had to be narrowly tailored to survive strict scrutiny. The touchstone of narrow tailoring was a holistic review process that treated all applicants as individuals with a range of backgrounds and experiences.[12] Race could be one factor but it could not be used in heavy-handed ways that raised the specter of a quota.[13] O'Connor concluded that the Michigan Law School's admissions system satisfied the standard, but even then, she expressed a fervent hope that race-conscious affirmative action would no longer be necessary in twenty-five years.[14]

Although the *Grutter* decision was controversial for a number of reasons,[15] school officials and their counsel in Louisville and Seattle undoubtedly welcomed the ruling as a way to defend voluntary integration plans.[16] School boards in both cities had adopted plans that gave some weight to race in determining whether a student's application to enroll in a school would be approved. Louisville put its voluntary plan in place when a federal court declared the district unitary and mandatory busing therefore drew to a close. Undoubtedly influenced by the Court's approach to desegregation, the plan assigned students to a school within a specified geographic area, or cluster, but rejected petitions to enroll that violated guidelines on the proportion of blacks in the student body.[17]

Seattle had not been subject to a desegregation order but had faced the threat of litigation. In part to avert a lawsuit, the school district adopted a series of voluntary plans. The one before the Court assigned ninth graders to

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[11] *Grutter*, 539 U.S. at 328–331.

[12] *Id.* at 334.

[13] *Id.* at 334–339; *see also Bakke*, 438 U.S. at 315, 319–320.

[14] *Grutter*, 539 U.S. at 341–343.

[15] Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201, 224–235 (2006); Rachel F. Moran, *The Heirs of* Brown*: The Story of* Grutter v. Bollinger, *in* RACE LAW STORIES 451, 490–495 (Rachel F. Moran & Devon W. Carbado eds., 2008).

[16] In fact, a federal court of appeals had relied on the diversity rationale to support a voluntary integration plan shortly after *Grutter* was decided. *See supra* note 7. When the Court granted certiorari in the Louisville and Seattle cases, speculation over *Grutter*'s implications continued. *See* David G. Savage, *Cases Retread* Brown v. Board of Education *Steps; The Supreme Court Takes Up Two School Integration Disputes that Could Have Far-Reaching Effects*, L.A. TIMES, Dec. 4, 2006, at A14 (describing *Grutter* as the exception to the Court's tendency to strike down government policies that rely on racial classifications).

[17] *Parents Involved*, 127 S. Ct. at 2749 (with a district population that was 34% black and 66% white, schools had to have a minimum of 15% black enrollment and a maximum of 50% black enrollment).

high schools based on their expressed preferences.[18] In the event that a school was oversubscribed, race could operate as a tiebreaker as could geographic proximity of the school to a student's residence or the presence of a sibling in the school.[19] With a multiracial population of blacks, whites, Asian Americans, and Latinos, Seattle measured the proportion of white to non-white students in determining whether a school was diverse.[20] Although there were significant differences in the mechanics of the two plans, each school district justified its program, at least in part, as a way to achieve diversity in the student body. In doing so, both districts drew directly on the rationale in *Grutter*.[21]

Parents Involved easily could have become a referendum on *Grutter*, but this is not in fact what happened. Indeed, none of the Justices framed the litigation this way. In his plurality opinion, Chief Justice John Roberts deployed *Grutter* to eclipse *Brown*. This strategy seemed to suggest that *Grutter* was a powerful precedent, but at the same time, Roberts' opinion made clear that the diversity rationale had little force outside the realm of higher education.[22] So, *Grutter* became a shield that obscured *Brown*'s relevance but not a sword that would validate race-conscious policies outside colleges and universities. Having limited *Grutter* to its facts, Roberts made clear that, in general, the Constitution is colorblind and rejects government use of racial classifications.[23] According to Roberts, the Court allowed the use of race-conscious remedies to cure a history of past discrimination, but no such corrective justice rationale applied to these voluntary plans.[24] In Louisville, the vestiges of discrimination already had been eliminated root and branch, and in Seattle, there had never been proof of past wrongdoing.[25] So, remediation was simply irrelevant to the resolution of the litigation and, in effect, so was *Brown*. With neither diversity nor corrective justice

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[18] *Id.* at 2746–2747.

[19] *Id.* at 2747.

[20] *Id.* at 2746–2748 (with a 41% white and 59% non-white student body, schools had to be within 10% of this overall level of racial balance). The first tiebreaker was presence of a sibling, the second was race, and the third was geographic proximity. *Id.* at 2747.

[21] Brief for Respondents at 24–30, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908); Brief for Respondents at 26–27, Meredith v. Jefferson County Bd. of Educ., 127 S. Ct. 2738 (2007) (No. 05-915).

[22] *Parents Involved*, 127 S. Ct. at 2754.

[23] *Id.* at 2757–2759.

[24] *Id.* at 2752.

[25] *Id.* at 2761.

available as justifications, the school systems had no basis for relying on race in student assignments.[26]

Although these observations were fatal in their own right, the plurality went on to note that the plans were not narrowly tailored to advance the districts' stated rationales.[27] In particular, each plan sought racial balance for its own sake by enforcing rules of strict proportionality.[28] These rules often made no sense from the perspective of diversity, Roberts concluded. For example, Seattle looked solely at the proportions of white and non-white students, so the district would reject as insufficiently diverse schools with enrollments that were twenty percent white, thirty percent Asian-American, twenty-five percent Latino, and twenty-five percent black.[29] Yet, this student body certainly seemed diverse insofar as it created the conditions for a lively exchange of ideas across a range of backgrounds and experiences.[30]

Even in Louisville, which had a predominantly black and white population, Roberts noted, *Grutter* would require that the district look at factors other than race. He observed that Michigan had considered whether students "have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields."[31] Some of these criteria admittedly made little sense in the context of elementary and secondary education. Even so, Roberts faulted Louisville for its failure to supplement the focus on race with other kinds of background and experience.[32]

For both political and legal reasons, the school districts had attempted to minimize the burdens imposed on students under voluntary integration plans. Rather than bolster the constitutionality of the assignment plans by demonstrating that race was accorded only a marginal weight, the limited impact became a basis for doubting the necessity of race-conscious remedies.[33] Roberts found that race played a negligible role in disposing of the vast majority of transfer applications, especially in Seattle where it operated as a tiebreaker. As a result, he concluded that race-neutral

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[26] *Id.*

[27] Seattle relied on the need to reduce racial concentration in the schools and to mitigate the impact of residential segregation on access to the most desirable schools, while Louisville cited a desire for "a racially integrated environment." *Id.* at 2755 (internal quotations and citations omitted).

[28] *Parents Involved*, 127 S. Ct. at 2757.

[29] *Id.* at 2756.

[30] *Id.* at 2756.

[31] *Id.* at 2753 (citing Grutter v. Bollinger, 539 U.S. at 338).

[32] *Id.*

[33] *Id.* at 2760.

alternatives were apt to be nearly as, if not just as, effective.[34] Under *Grutter*, Roberts contended, the districts had to employ race-neutral alternatives when they were available, and here, neither had done so.[35]

In *Parents Involved*, Justice Clarence Thomas was the most vocal critic of race-conscious remedies. Rather than focusing on *Grutter*'s implications, his separate concurrence emphasized the ideal of a colorblind Constitution as the essence of *Brown*'s legacy.[36] Going even further, he condemned color-conscious remedies like the voluntary integration plans as themselves tainted by a segregationist legacy of racial subordination and stratification.[37] He derided the boards' efforts as the product of sociological theories of race, the very kind of approach that previously had laid the foundation for the Court's approval of "separate but equal" policies in *Plessy v. Ferguson*.[38] So Thomas warned: "Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow."[39]

The Roberts plurality had accepted strict scrutiny as the standard of review but rejected the relevance of diversity.[40] By contrast, Justice Stephen Breyer acknowledged diversity as a compelling interest in elementary and secondary schools, but he ultimately found that strict scrutiny was inappropriate because of the special history of school integration.[41] In his dissenting opinion, *Grutter* mainly was used to demonstrate that even if strict scrutiny applied, it did not automatically invalidate race-conscious programs.[42] For the Breyer dissent, an in-depth analysis of the diversity rationale also proved largely beside the point, not because *Grutter* was a higher education case but because *Brown* and its progeny were dispositive.

Breyer insisted that *Brown*'s legacy not only compelled desegregation to correct past injustices but also permitted voluntary plans to promote diversity and prevent racial isolation.[43] As support, he cited the Court's unanimous decision upholding mandatory busing in *Swann v. Charlotte-Mecklenburg*

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[34] *Parents Involved*, 127 S. Ct. at 2760.

[35] *Id.*

[36] *Id.* at 2782–2783 (Thomas, J., concurring).

[37] *Id.* at 2783 (Thomas, J., concurring).

[38] *Id.* at 2776–2779 (Thomas, J., concurring).

[39] *Id.* at 2788 (Thomas, J., concurring) (citing Dred Scott v. Sanford, 60 U.S. 393 (1857); Plessy v. Ferguson, 163 U.S. 537 (1896)).

[40] *Parents Involved*, 127 S. Ct. at 2751–2752, 2753–2754.

[41] *Id.* at 2815, 2820–2822 (Breyer, J., dissenting)

[42] *Id.* at 2816–2818 (Breyer, J., dissenting).

[43] *Id.* at 2811–2816 (Breyer, J., dissenting).

School Board.[44] There, Chief Justice Warren Burger cited the need for judicial deference to school board judgments about whether to implement voluntary plans.[45] In light of the persistence of racial segregation, the dissent argued, the Court's decision to strike down the Seattle and Louisville programs "threaten[ed] the promise of *Brown*."[46]

Breyer's choice of *Swann* was far from accidental. It was the last major desegregation case in which the Court spoke with one voice. The unanimous opinion was the product of tense negotiation and behind-the-scenes compromise among the Justices,[47] but this fragile consensus fell apart in later cases as the Justices descended into open bickering about *Brown*'s meaning.[48] Although Roberts' plurality opinion took the dissent to task for overlooking these subsequent decisions,[49] Breyer treated *Swann* as the last opinion that truly honored *Brown*'s legacy.[50] In his view, the Louisville and Seattle plans fell squarely within *Swann*'s purview.[51] Despite the Court's recent jurisprudence applying strict scrutiny to all government racial classifications, Breyer boldly argued that out of respect for *Brown*, the Court should defer to school boards' assessments of how best to advance academic achievement and racial tolerance through integration.[52]

Justice Anthony Kennedy was left to split the difference. Kennedy agreed with the plurality that strict scrutiny should apply whenever individuals were subject to differential treatment on the basis of race.[53] Yet, he was not convinced that school boards could consider race only when remedying the vestiges of past discrimination. Instead, he agreed with the dissent that nurturing diversity and preventing racial isolation were

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[44] *Id.* at 2811–2812 (Breyer, J., dissenting) (citing Swann v. Charlotte Mecklenburg Sch. Bd., 402 U.S. 1 (1971)).

[45] *Swann*, 402 U.S. at 16; *see also* N.C. Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971).

[46] *Parents Involved*, 127 S. Ct. at 2837 (Breyer, J., dissenting).

[47] *See* BERNARD SCHWARTZ, *SWANN*'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT 111–184 (1986).

[48] *See* J. HARVIE WILKINSON, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 222–228, 245–246 (1979).

[49] *Parents Involved*, 127 S. Ct. at 2762.

[50] *See id.* at 2812 (Breyer, J., dissenting).

[51] *Id.* at 2834 (Breyer, J., dissenting).

[52] *Id.* at 2818–2820 (Breyer, J., dissenting). In this, Breyer appeared to adopt the position advocated by the NAACP Legal Defense and Educational Fund in its amicus brief. *See* Brief of the NAACP Legal Defense and Educational Fund, Inc., *supra* note 8, at 9–14.

[53] *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

acceptable constitutional justifications for the Seattle and Louisville plans.[54] Nonetheless, Kennedy found that the mechanics of the student assignment programs were too crudely race-based to be acceptable. Instead of offering examples of permissible plans akin to the one upheld in *Grutter*, Kennedy indicated that he preferred race-conscious decisions that did not rely on the differential treatment of individuals. For instance, officials instead could promote integrated student bodies through the selection of school construction sites or the drawing of attendance boundaries.[55]

Ironically, then, a case that began as a referendum on *Grutter* ultimately marginalized that decision. The plurality confined the diversity rationale to higher education, but even the dissent concluded that the *Parents Involved* litigation mainly implicated school desegregation precedents. As a result, the cosmopolitan ideals of higher education could not save the Louisville and Seattle plans, and the Justices were left to wage the battle for *Brown*'s legacy on other grounds. The fragmented opinions in *Parents Involved* were the culmination of longstanding conflicts over the meaning of race and the nature of equal protection. These disagreements were so profound that they had converted *Brown* into a decision at war with itself.

II. *BROWN*'S LEGACY: A DECISION AT WAR WITH ITSELF

In *Parents Involved*, all of the Justices laid claim to *Brown*'s legacy, in part because of its iconic status in civil rights law.[56] The sense that homage must be paid, however, exhausted any consensus about the landmark decision. *Brown* spawned a jurisprudence of fragmentation that culminated in an acrimonious debate over the legitimacy of voluntary desegregation plans. Although the fractured opinions in *Parents Involved* reflected competing views of race, the Court largely omitted dynamic accounts based on the autonomy to express a unique identity. As a result, the diversity rationale offered little comfort to the Louisville and Seattle school districts

A. *How the Battle Lines Were Drawn*

At the outset, *Brown* seemed to have a clear objective: to strike down the "separate but equal" doctrine that the Court had endorsed in *Plessy v.*

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[54] *Id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

[55] *Id.* at 2792 (Kennedy, J., concurring in part and concurring in judgment).

[56] *Id.* at 2767–2768 (Roberts, C.J., plurality); *Id.*at 2768, 2783–2786 (Thomas, J., concurring); *Id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment); *Id.* at 2797–2798, 2799–2800 (Stevens, J., dissenting); *Id.* at 2800–2801, 2836–2837 (Breyer, J., dissenting).

Ferguson[57] in 1896. *Plessy* helped to entrench segregation by giving it the patina of constitutionality and the semblance of equality. Only Justice John Marshall Harlan dissented from the ruling, insisting that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."[58] For him, blacks and whites had to be equal before the law, a formal right conferred by national citizenship.[59] This right was not necessarily a reflection of actual equality of the races, as Harlan made clear when he remarked that "[t]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage."[60] Because Harlan saw racial differences as natural and inevitable, he did not expect formally equal treatment to eliminate them. In short, his principle of colorblindness was entirely consistent with racial stratification.

After *Plessy* legitimized a doctrine of "separate but equal" over Harlan's dissent, civil rights advocates faced a stark legal landscape until events surrounding World War II laid the foundation for renewed demands for racial justice.[61] The National Association for the Advancement of Colored People (NAACP) had been waging a long-term litigation campaign that, from the late 1930s to 1950, resulted in key victories in lawsuits challenging the exclusion of blacks from public institutions of higher education.[62] The Court struck down official practices that barred black applicants from admission and redirected them to schools in neighboring states.[63] The Court also found that a separate public system of black colleges and universities could not justify exclusion from white schools.[64] Finally, the Court concluded that once admitted, blacks could not be segregated from whites in the library, the

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[57] 163 U.S. 537, 551–552 (1896).

[58] *Id.* at 559 (Harlan, J., dissenting).

[59] Goodwin Liu, *"History Will Be Heard": An Appraisal of the Seattle/Louisville Decision*, 2 HARV. L. & POL'Y REV. 53, 55–56 (2008).

[60] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). *See also* Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 647 (2005) (describing Harlan's distinction between equality before the law and equality in fact).

[61] For a description of how post-World War II developments affected the movement for racial equality in the United States, see Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

[62] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 251–255, 266, 323–357 (1975).

[63] Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 334–345 (1938); Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631, 632–633 (1948).

[64] Sweatt v. Painter, 339 U.S. 629, 635 (1950).

classroom, or the dining hall.[65] In each instance, the Court cited either tangible inequalities in facilities, personnel, or resources, or intangible inequalities, for example, in access to reputational advantages and elite alumni networks.

Brown did not come out of nowhere, but was clearly anchored in these early victories in higher education. *Brown* was special, though, because it had the potential to touch the lives of many Americans who would never attend a college or university. Although a few students enrolled in private elementary and secondary schools for reasons of prestige or religion, the vast majority went to public institutions. These "common schools" were places where children from different backgrounds could come together to forge a unifying and unique American identity.[66]

When Chief Justice Earl Warren wrote that "'separate but equal' has no place" in the public schools, his decision for a unanimous Court was potentially breathtaking in scope.[67] Warren condemned segregation, even if tangible resources in black and white schools could be equalized. He cited the intangible costs, particularly stigmatic injuries that damaged the "hearts and minds" of black children "in a way unlikely ever to be undone."[68] In light of the history of "separate but equal" laws and the description of segregation's cruel effects, *Brown* appeared to take direct aim at conditions of racial stratification and subordination. The Court seemed squarely focused on the harm to victims that inhered in a system of racially identifiable public schools.

Of course, *Brown*'s potential to fight oppression depended not just on its rhetoric but on its implementation. In *Brown II*,[69] the Court faced the daunting task of fashioning remedies to cure the constitutional wrong of de jure segregation. The Justices adopted a formula of "all deliberate speed"[70] and left to the federal district courts the task of crafting plans on a case-by-

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[65] McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 640, 642 (1950).

[66] DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954, at 195, 199–200 (1987); DAVID TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION 270–272 (1974).

[67] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[68] *Id.* at 494. In reaching this conclusion, Warren relied in part on psychological research by Dr. Kenneth Clark, which found that regardless of their race, children preferred white dolls to black dolls. *Id.* at 494 n.11. This finding was deemed to be evidence that black children had internalized a sense of inferiority due to segregation. *Id.* at 494. The reliance on social science evidence became a highly controversial feature of the *Brown* opinion. *See, e.g.*, Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157–158 (1955).

[69] 349 U.S. 294 (1955).

[70] *Id.* at 301.

case basis. Although there was far more deliberation than speed in the years immediately following *Brown*, the Court affected a studied silence on the adequacy of remedies for school segregation.[71]

That passive stance changed when, in the wake of civil unrest, Congress passed the Civil Rights Act of 1964.[72] With congressional support and agency enforcement, the Justices felt emboldened to speak to the propriety of various remedies for state-mandated segregation. The Court rejected "freedom of choice" plans that merely eliminated formal barriers to attending integrated public schools.[73] According to the Justices, habits and prejudices born of longstanding forced segregation tainted choices about where to go to school and so perpetuated racial isolation.[74] Later, the Court identified the affirmative steps that schools had to take to rectify past discrimination. One of the most controversial measures was busing, but the Justices unanimously endorsed this remedy in the *Swann* case.[75] Though increasingly conflicted about the scope of desegregation plans, the Court preserved a unified front in deference to *Brown*.[76]

As desegregation cases targeted the North and West, this fragile unanimity shattered. Once challenges moved outside the South, with its glaring history of slavery and Jim Crow, the Justices no longer felt compelled to speak with one voice to uphold *Brown*'s legacy. In *Keyes v. School District No. 1*,[77] a majority of the Court upheld a city-wide busing plan in Denver, Colorado but only over vigorous dissent. Five Justices were willing to join Justice William Brennan in inferring that segregative practices in one neighborhood were presumptive evidence of discriminatory behavior elsewhere in the school system and had the likely effect of distorting pupil assignments throughout the district.[78] Chief Justice Warren Burger concurred only in the result,[79] Justice Lewis Powell filed a separate opinion that rejected the de jure/de facto distinction,[80] Justice William Rehnquist dissented,[81] and Justice Byron White did not participate in the case.[82]

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[71] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 321 (2004).

[72] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 1971, 1983, 2000a *et seq.*).

[73] Green v. County Sch. Bd., 391 U.S. 430, 441–442 (1968).

[74] *Id.*

[75] Swann v. Charlotte Mecklenburg Sch. Bd., 402 U.S. 1, 29–31 (1971).

[76] SCHWARTZ, *supra* note 47, at 182–184.

[77] 413 U.S. 189 (1973).

[78] *Id.* at 201–213.

[79] *Id.* at 214 (Burger, C.J., concurring in the result).

[80] *Id.* at 217 (Powell, J., concurring in part and dissenting in part). Powell adopted this position in part because he did not believe that the South should be treated differently

In *Milliken v. Bradley*,[83] a divided Court struck down a mandatory busing plan that enlisted white students in nearby suburban districts to desegregate the heavily non-white school system in Detroit. The majority rejected interdistrict plans unless suburban school boards had contributed in some way to the history of intentional segregation that triggered a busing remedy in the central city.[84] Because Detroit's situation was typical of most metropolitan areas, *Milliken* sounded the death knell for meaningful integration in most cities outside the South.[85] Even where desegregation orders had been implemented, federal district courts began to withdraw from oversight by declaring school districts free of any vestiges of past discrimination. The Court endorsed these efforts in two decisions in the 1990s.[86] Again, the Justices were split with the majority receptive to the possibility of terminating desegregation orders, and the minority worried about the possibility of resegregation.[87]

Brown became a decision at war with itself in part because of the strong political resistance that federal courts faced when they ordered desegregation, in particular, mandatory busing. If *Brown I* and *II* had left the scope of the Court's remedial ambitions ambiguous, the ensuing backlash against busing made some clarification and even constitutional revisionism seem prudent and indeed imperative.[88] Chief Justice Warren's opinion had spoken of the devastating effects on children of forced racial separation. Yet, as calls for integration moved North and West, the Justices increasingly turned to the de facto/de jure distinction to limit the scope of unpopular busing remedies. Judicial intervention was appropriate only to redress

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from other parts of the country. JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR. 298–300 (1994). He later retreated from this position as an improvident one, the product of "Confederate emotions." *Id.* at 306 (internal quotations omitted).

[81] *Keyes*, 413 U.S. at 254 (Rehnquist, J., dissenting). Rehnquist took the position that absent express segregation by law, there was no equal protection violation under *Brown*, a classic anti-classification account of the Constitution. *Id.* at 254–258.

[82] *Id.* at 214.

[83] 418 U.S. 717 (1974). Later, the Court relied on compensatory programs to cure the history of discrimination in Detroit because desegregation was impossible without the cooperation of white students in suburban school systems. Milliken v. Bradley, 433 U.S. 267 (1977).

[84] *Milliken*, 418 U.S. at 744–752.

[85] WILKINSON, *supra* note 48, at 223–226; Sheryll D. Cashin, *American Public Schools Fifty Years After* Brown*: A Separate and Unequal Reality*, 47 HOW. L.J. 341, 346–347 (2004).

[86] Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237 (1991).

[87] *Freeman*, 503 U.S. at 489–490; *Dowell*, 498 U.S. at 251.

[88] WILKINSON, *supra* note 48, at 227–230.

intentional wrongdoing by public officials; federal judges were not empowered to undo segregated patterns that resulted from private residential choices.

In short, the government's invidious reliance on race, rather than the harmful effects on children's "hearts and minds," came to dominate the Court's equal protection jurisprudence.[89] To avoid any appearance of inconsistency with *Brown*, the Court embraced Harlan's dissent in *Plessy* as unequivocal authority for an anti-classification interpretation of equal protection law. Critics have argued that Harlan's jurisprudential legacy is not so clear-cut, noting that he was sometimes willing to allow the government to rely on racial categories for purposes that were hardly benevolent.[90] Nonetheless, members of the Court not only distilled the principle of colorblindness from the *Plessy* dissent but also assumed that Warren had endorsed that reasoning in rejecting the "separate but equal" doctrine. By converting Warren into Harlan's acolyte, the Court was able to shift its gaze from racial subordination to racial classification, all while professing complete fidelity to *Brown*'s integrationist legacy.[91]

The shift to an anti-classification Constitution meant that the Court was more concerned with the propriety of official behavior than with the lived experience of inequality and the costs exacted from the disadvantaged. Under an interpretation of the type suggested by Justice Harlan in his *Plessy* dissent, there was little solicitude for voluntary integration plans to counteract the "private choices" and "demographic shifts"[92] that yielded racially identifiable neighborhoods and schools. Because no past official misconduct was at issue, the Court could not justify the plans as cures for past discrimination. Instead, the Justices would be endorsing the use of racial classifications they had decried as insidious. The plans' approval would depend on weighing the harms of segregation against the benefits of integration. Yet, this was precisely the sort of empirical inquiry that had put the Court at the center of a political maelstrom after *Brown*.[93] Rather than become self-appointed racial

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[89] Siegel, *supra* note 5, at 1505–1513.

[90] Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 157–158 (1996); Earl M. Maltz, *Only Partially Color-Blind: John Marshall Harlan's View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973, 988–992 (1996).

[91] Siegel, *supra* note 5, at 1515–1521.

[92] *Freeman*, 503 U.S. at 495; *see also Parents Involved*, 127 S. Ct. at 2761 (2007) (Roberts, C.J., plurality) (citing *Freeman* to make the distinction between de jure segregation, for which remedies are necessary, and de facto segregation, for which they are not).

[93] Jack M. Balkin, *Rewriting* Brown*: A Guide to the Opinions*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 44, 50–52 (Jack M. Balkin ed., 2001); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 42 (2000).

engineers, the anti-classificationists on the Court preferred to dismiss the use of race out of hand.

For proponents of an anti-subordination Constitution, the Court was obligated to do its utmost to root out stigmatizing segregation, regardless of its causes.[94] Even if the de jure/de facto distinction operated as a constraint on judicial authority to order desegregation plans, the doctrine by no means precluded voluntary plans. In fact, such efforts were essential because long after *Brown* was decided, public school segregation persisted due to pervasive residential segregation.[95] Experiments with race-neutral alternatives like socioeconomic integration had generated only mixed success in producing racially diverse schools. So, to achieve meaningful integration at the elementary and secondary level, it was essential that the Court uphold some race-conscious voluntary plans.[96]

With court-ordered desegregation drawing to a close, student assignment plans could no longer be justified as purely remedial interventions. Instead, school boards sought to defend the plans on pedagogical grounds. Here, however, advocates of integration faced an important obstacle to preserving *Brown*'s legacy. The decision did not expressly recognize education as a fundamental right under the Constitution, though some of the language clearly seemed to support that interpretation.[97] As Chief Justice Warren observed, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[98] In other circumstances, the Court had recognized rights not explicitly mentioned in the Constitution because they were necessary to guarantee other fundamental liberties. So, for example, the Justices implied a right to interstate travel to

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[94] Balkin, *supra* note 93, at 52–53; Catharine A. MacKinnon, *MacKinnon, J., concurring in the judgment*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION, *supra* note 93, at 145–147.

[95] Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 61–63 (Gary Orfield et al. eds., 1996).

[96] *Compare* Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1551–1557 (2007) (citing the success of socioeconomic integration plans in producing racial diversity), *with* Cashin, *supra* note 85, at 359–360 (describing the "tide of parental skepticism" that greets proposals for socioeconomic integration, thus limiting their utility in advancing racial integration).

[97] In the companion case of *Bolling v. Sharpe*, 347 U.S. 497 (1954), a passage that came close to recognizing education as a fundamental liberty under the Due Process Clause was dropped to preserve unanimity, but "one could be forgiven for thinking that the Court *did* hold that education was a fundamental interest in 1954, even if later courts came to a contrary conclusion." Balkin, *supra* note 93, at 58 (emphasis in original).

[98] *Brown*, 347 U.S. at 493 (1954).

ensure access to the seat of national government.[99] Assuming that public education was integral to preparation for not just work but citizenship, the Court might similarly infer a right of access to the instructional process.[100]

Efforts to reconstruct *Brown* as constitutional protection for a right to learn were thwarted, however. At the same time that the Court was developing its anti-classification approach to desegregation cases, the Justices dashed any hope that the Constitution mandated equal educational opportunity for all children. In *San Antonio Independent School District v. Rodriguez*,[101] the plaintiffs argued that a local property tax system used to finance the public schools was unconstitutional because it led to highly unequal per capita student expenditures. The Court rejected this claim because, among other things, education was a state and local responsibility, and the federal Constitution did not mandate precise equivalence in delivering these services (though the Justices indicated in dicta that there might be some guarantee of minimum access).[102]

After *Rodriguez*, integration could not be defended as a constitutionally required educational strategy—a means of fulfilling the obligation to provide equal opportunity in a common school. Under the Court's interpretation of the Equal Protection Clause, there was no implied right to attend an integrated school as a necessary component of preparing children for work and citizenship in a diverse society. Shorn of a justification rooted in the right to an education, the war over *Brown*'s legacy was reduced to a dialectic between an anti-classification and an anti-subordination Constitution.

B. *How Race Became Reified*

The war over *Brown*'s legacy has reified race in ways that obscure important aspects of this identity trait. Neil Gotanda identifies four different ways that the Court conceptualizes race.[103] Proponents of an anti-classification Constitution rely on formal-race, defined as a biological trait that is presumptively irrelevant to government decision-making. Colorblindness becomes the normative ideal because race is immaterial to the official allocation of benefits and burdens.[104] Advocates of an anti-subordination Constitution use historical-race, which focuses on "past and

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[99] Shapiro v. Thompson, 394 U.S. 618, 631–632 (1969).

[100] *See* Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 HOW. L.J. 705, 707–708 (2004).

[101] 411 U.S. 1 (1973).

[102] *Id.* at 23–25 & n.60, 37–44.

[103] Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 4 (1991).

[104] *Id.* at 4.

continuing [effects of] racial subordination."[105] Historical-race underlies government efforts to eradicate illicit stereotypes and institutional structures like segregated schools that entrench inequality.[106] Desegregation jurisprudence also makes room for status-race, which refers to "the traditional notion of race as an indicator of social status." [107] Status-race undergirds judicial efforts to eliminate intentional discrimination, including de jure segregation, that perpetuates assumptions of racial inferiority.

What is obscured in the Court's analysis of school desegregation, however, is culture-race, which Gotanda describes as a product of "broadly shared beliefs and social practices" that generate a sense of "cultural diversity."[108] Race is no longer a biological irrelevancy that has to be ignored, nor is race automatically a marker of inequality and prejudice that must be erased through assimilative policies. On the contrary, so long as practices and associations are freely chosen, race should be treated as a material feature of everyday life that government must acknowledge and respect. Officials are obligated to ensure tolerance and civility among groups as they pursue their distinct cultural identities in a pluralistic society.[109]

Culture-race engenders concerns about both freedom and equality. Here, constitutional scholar Kenneth Karst's foundational work on equal liberties is especially helpful. Karst contends that equal citizenship requires that members of minority groups be permitted to exercise fundamental freedoms on the same terms as other citizens.[110] Among these freedoms would certainly be a right to inculcate distinct cultural identities.[111] In analyzing citizenship and the Constitution, Cristina Rodriguez has extended this reasoning to language and participation by insisting on a "[f]luid civic

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105 *Id.*

106 *Id.* at 47–48.

107 *Id.* at 4.

108 *Id.* at 4–5.

109 Gotanda, *supra* note 103, at 67–68.

110 *See generally*, Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 102–113 (2007) (tracing the historical development of equal liberties to protect racial minority groups under equal protection and due process).

111 Kenneth L. Karst, *The Bonds of American Nationhood*, 21 CARDOZO L. REV. 1141, 1172–1173 (2000) ("Government in America has no constitutional authority to patrol the borders of a cultural group. . . ."); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 337 (1986) ("The most important constitutional development of the twentieth century, the emergence of the principle of equal citizenship, has promoted the freedom of individual choice about cultural identification.").

identity [that], at its core, disavows assimilation."[112] In particular, she contends that "participation in political and social life cannot require that the participant repress or ignore meaningful cultural and linguistic affiliations."[113] Like Karst, Rodriguez links equality to liberty in calling for the autonomy to preserve one's heritage.

In the school context, a recognition of culture-race and the equal liberty to preserve this heritage would require courts to focus on whether students enjoy equal opportunities to develop their identities in a diverse classroom. Race could no longer be treated as presumptively irrelevant, nor could judges readily equate anti-subordination and assimilation. Had the Justices recognized a fundamental right to education, school boards would have had a legal vocabulary large enough to include culture-race in conceptualizing the challenges presented by increasingly multiracial, multiethnic student bodies. Given the Court's exclusive focus on rectifying past racial wrongs, however, there was little room for this type of discourse in the school desegregation cases.

During the 1970s, lawsuits in the West raised questions about the trade-offs between busing and bilingual education. In San Francisco, parents opposed a plan that would remove children from Chinatown and diminish their access to programs that addressed Chinese-speaking students' special linguistic and cultural needs.[114] In Denver, Latino parents raised a similar objection to a busing plan that interfered with bilingual-bicultural instruction.[115] In both instances, the Court rejected the demands to temper court-ordered desegregation in deference to linguistic and cultural autonomy.

The Court already had disregarded the liberty claims of whites who insisted that forced busing infringed on their freedom to associate with those of their own choosing, that is, other whites.[116] These arguments were equated with thinly veiled racism. In many ways, the Court subsumed the arguments of Chinese and Latino parents within this debate. Race could be a mark of wrongful discrimination and subordination, but not of an autonomously

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[112] Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 145 (2001).

[113] *Id.*

[114] Rachel F. Moran, *The Story of* Lau v. Nichols*: Breaking the Silence in Chinatown*, *in* EDUCATION LAW STORIES 113, 115–116 (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

[115] Rachel F. Moran, *Courts and the Construction of Racial and Ethnic Identity: Public Law Litigation in the Denver Schools*, *in* LEGAL CULTURE AND THE LEGAL PROFESSION 153, 159–160 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996).

[116] For the classic account of court-ordered desegregation as an infringement on associational rights, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–35 (1959).

chosen set of cultural commitments. Chinese and Latino parents who thought otherwise were characterized as victims of a false consciousness that aligned them with white resistance when the Court already had concluded that, as racial and ethnic minorities, their interests were aligned with those of blacks. The Justices emphasized that Jim Crow had come to Chinatown and the barrio, and so would desegregation.[117] In these cases, there was simply no room for a form of culture-race that demanded the freedom to forge a unique identity as well as an equal chance to participate in American society—at least where there had been a history of intentional racial discrimination.

The Supreme Court was not alone in linking bilingual-bicultural education to anti-busing sentiment. In 1974, the Nixon Administration pressed for passage of the Equal Educational Opportunities Act.[118] The measure offered alternatives to busing remedies, and one of these was bilingual programs for students who spoke a language other than English.[119] The legislation had its roots in a powerful backlash against court-ordered busing, a reaction typified by violent protests around the nation.[120] This backlash lay at the heart of a long-running battle over busing in California, a struggle waged at the ballot box as well as in state and federal court. California's experience reveals how the neglect of culture-race could fuel opposition to busing remedies.

In 1963, the California Supreme Court held that the state constitution prohibited both de jure and de facto segregation in the public schools.[121] As a result, nearly all of the Los Angeles school system potentially became subject to court-ordered student transportation.[122] Widespread resistance ensued, and advocates of "white rights" succeeded in enacting a 1972 ballot measure that declared that: "No public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular

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[117] Guey Heung Lee v. Johnson, 404 U.S. 1215, 1216 (1971) ("*Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco."); *see also* Keyes v. School District No. 1, 413 U.S. 189, 197–198 (1973) (analogizing Hispanics to blacks in defining a segregated school).

[118] Pub. L. No. 93-380, 88 Stat. 514 (codified at 20 U.S.C. §§ 1701–1758 (2000)); Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1271 (1988).

[119] Moran, *supra* note 118, at 1271. *See also* Jonathan D. Haft, *Assuring Equal Educational Opportunity for Language-Minority Students: Bilingual Education and the Equal Educational Opportunity Act of 1974*, 18 COLUM. J. L. & SOC. PROBS. 209, 233–234, 236 (1983).

[120] For a description of some of the violence that arose outside the South in response to school busing plans, see WILKINSON, *supra* note 48, at 202–215.

[121] Jackson v. Pasadena City School District, 382 P.2d 878, 881 (Cal. 1963).

[122] Crawford v. Board of Education, 551 P.2d 28, 30–31, 45–48 (Cal. 1976).

school."[123] Although 63% of the electorate supported the initiative, the California Supreme Court struck it down because it unconstitutionally prohibited schools from dismantling de jure segregation, as required by the federal Constitution.[124]

The next time around, busing foes adopted a different strategy. This time, leaders enlisted the support of blacks and Latinos to rebuff any allegations of racist motivation. One Latino politician in East Los Angeles circulated a letter that warned: "Compulsory busing in most California cities would mean the virtual end of bilingual education as we know it today."[125] Chicano members of a community advisory committee appointed by the Los Angeles school board also expressed doubts about "an integration policy that is totally assimilationist in nature—one that does not respect the rights and needs of the culturally different."[126] This time, opponents of busing successfully enacted a provision that barred California courts from ordering remedies unless they were independently required under the Fourteenth Amendment of the United States Constitution. The measure was justified as a way to respect all children's learning needs; indeed, the campaign's slogan was "We love all kids."[127] The measure not only won nearly 70% of the vote, but also survived legal challenges in state and federal court.[128]

In *Crawford v. Board of Education*,[129] Justice Lewis Powell wrote for the majority that upheld the California ballot measure. Powell noted that the Fourteenth Amendment should not be "destructive of a State's democratic processes and of its ability to experiment."[130] In concluding that the democratic process in California had functioned appropriately, the Court was clearly influenced by the multiracial nature of the state's population and its broad support for the measure. *Crawford* found that the ballot measure was race-neutral both on its face and in practice. As Powell observed,

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[123] Proposition 21, § 1 (Nov. 7, 1972) (cited in Santa Barbara Sch. Dist. v. Superior Court, 530 P.2d 605, 611 (Cal. 1975)).

[124] *Santa Barbara Sch. Dist.*, 530 P.2d at 613–615; Daniel Martinez-HoSang, *The Triumph of Racial Liberalism, the Demise of Racial Justice*, *in* RACE AND AMERICAN POLITICAL DEVELOPMENT 288, 292 (Joseph Lowndes, Julie Novkov & Dorian Warren eds., 2008).

[125] Martinez-HoSang, *supra* note 124, at 297 (citing a letter from Alex Garcia, California State Senator, to California State Senators (Nov. 30, 1977)).

[126] *Id.* at 298 (citing CARLOS MANUEL HARO, MEXICANO/CHICANO CONCERNS AND SCHOOL DESEGREGATION IN LOS ANGELES 17 (1977)).

[127] *Id.* at 303.

[128] Crawford v. Board of Education, 458 U.S. 527, 532 n.5 (1982), *aff'g*, Crawford v. Board of Education, 170 Cal. Rptr. 495, 509 (Cal. Ct. App. 1981).

[129] 458 U.S. 527 (1982).

[130] *Id.* at 535.

> The benefit [the ballot measure] seeks to confer—neighborhood schooling—is made available regardless of race in the discretion of school boards. Indeed, even if [the measure] had a racially discriminatory effect, in view of the demographic mix of the District it is not clear which race or races would be affected the most or in what way.[131]

Moreover, because the initiative "was approved by an overwhelming majority of the electorate" and "received support from members of all races,"[132] Powell rejected any claim that it was motivated by a discriminatory purpose. Under the circumstances, the Court was content to let the political process run its course lest the judiciary "limit seriously the authority of States to deal with the problems of our heterogeneous population."[133]

Ironically, *Crawford* recognized the dynamic tensions between desegregation on the one hand and linguistic and cultural autonomy on the other only to place these contested notions beyond the Justices' reach. By deferring to the wishes of a multiracial, multiethnic electorate, the Court treated fluid notions of identity, akin to what Gotanda would call culture-race, as the province of private preferences and political strategizing. The complexities of a dynamic approach to identity, expressed as a conflict between the imperative of racial equality and the freedom to preserve a way of life, simply fell outside the realm of judicial second-guessing.[134] As a result, the Court was able to protect its definition of race as either a formal category or a mark of subordination. Even the lone dissenter in *Crawford*, Justice Thurgood Marshall, focused on the demands of corrective justice to rectify past discrimination. He reminded the Court of the long history of resistance to court-ordered busing in California, and he asserted that, under these circumstances, the initiative was an unconstitutional usurpation of state judicial power to enforce a norm of equal protection.[135] His strong anti-subordination perspective largely ignored the idea of culture-race.

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[131] *Id.* at 537.

[132] *Id.* at 545.

[133] *Id.* at 539.

[134] Professor Ian Haney López suggests that in adopting a diversity rationale for affirmative action in higher education, Justice Powell relied on the image of "a nation of minorities" in which groups stood on a relatively equal footing in competing for political advantage. Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1063 (2007). Haney López contends that a laissez-faire attitude toward ethnic politics follows from this analysis and criticizes the Court for intervening to invalidate minority set-asides that were the product of a competitive political process in the city of Richmond, Virginia. *Id.* Haney López does not address Powell's opinion in *Crawford*, however. For more in-depth discussion of these issues, see *infra* notes 247–260 and accompanying text.

[135] *Crawford*, 458 U.S. at 548–551, 554–556 (Marshall, J., dissenting).

As this brief history makes clear, there has been little room in the Court's jurisprudence to contemplate culture-race. The opinions in *Parents Involved* all reflect this omission. Whatever their ideological predilections, the Justices have paid little or no attention to dynamic and fluid conceptions of race. For the plurality, an anti-classification Constitution meant that race is a biological irrelevancy, and shifting social practices were beside the point as a matter of constitutional interpretation. To rebuff the Louisville and Seattle school districts' claims about culture-race and the socialization process, the plurality dismissed a diversity rationale as wholly inapposite outside the realm of higher education. For the dissent, the anti-subordination Constitution controlled, so that schools could presume the benefits of integration as well as the harms of racial isolation with limited judicial oversight. In Breyer's opinion, historical-race and status-race were key, and the nod to diversity paid lip service to culture-race without really engaging it. In fact, the dissent treated the goal of eliminating racial isolation as largely fungible with diversity, an approach that prompted the plurality to accuse the dissent of seeking racial balance for its own sake.[136]

Only Justice Kennedy occupied a niche that does not fit neatly into the conventional struggle over *Brown*'s meaning. Although persuaded by the dissent that racial stratification persists, he was drawn to the plurality's anti-classification norm when individuals directly experience differential treatment on the basis of race. Kennedy previously had dissented in *Grutter*, apparently unconvinced that the law school admissions policy avoided the perils of a racial quota system.[137] So, perhaps it is unsurprising that he rejected the mechanics of the assignment policies in *Parents Involved*, particularly if the school districts engaged in judgments even less nuanced than those in the Michigan case.[138] Yet, even if Kennedy deemed the voluntary plans in Louisville and Seattle unworkable, he wanted public schools to offer a space in which children from diverse backgrounds could come together to build their identities and bridge their differences. Without a well-developed account of culture-race in the desegregation jurisprudence, however, Kennedy had difficulty finding a robust way to infuse this value into his concurring opinion.

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[136] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2757–2759, 2763–2764 (2007) (Roberts, C.J., plurality). For a lengthier discussion of how all of the opinions in *Parents Involved* tended to conflate diversity and desegregation, see Rachel F. Moran, *Let Freedom Ring: Making* Grutter *Matter in School Desegregation Cases*, U. MIAMI L. REV. (forthcoming).

[137] *See* Grutter v. Bollinger, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting).

[138] 127 S. Ct. at 2793–2794 (Kennedy, J., concurring).

III. A DIFFERENT LOGIC: DIVERSITY IN HIGHER EDUCATION

Parents Involved reveals how desegregation jurisprudence has diverged from case law on affirmative action in higher education. To a significant degree, the two areas, though both addressing race and integration, have proceeded under entirely different logics. These distinct approaches are an artifact of the interplay of the Court and the political process. Although the Court took the lead in calling for public school desegregation, the executive branch demanded affirmative action in colleges and universities.[139] Because special admissions programs became pervasive without any findings of past discrimination, they did not fit neatly into the dialectic between an anti-classification and anti-subordination Constitution that dominated the battle over *Brown*'s legacy. When forced to confront the constitutionality of affirmative action in admissions, the Court sidestepped this ongoing conflict by making room for culture-race through a carefully circumscribed rubric of diversity. In *Parents Involved*, this notion eventually collided with the reified conceptions of race that have characterized the desegregation cases. Ultimately, the Court found it difficult to make room for culture-race in elementary and secondary school classrooms.

A. *From Colorblindness to Diversity: The Evolution of Racial Equality in Higher Education Cases*

In higher education, the Court's approach to racial equality has evolved from colorblindness to diversity. Initially, the Court embraced a formal approach to race in college and university admissions. In the years before *Brown*, the Court dismantled "separate but equal" policies but did not mandate any special steps to ensure access for black applicants.[140] Instead, the Justices held that if applicants met the relevant standard, they had to be admitted regardless of race.[141] This anti-classification strategy allowed black and white applicants "freedom of choice" in higher education.[142] Although this type of approach eventually was deemed inadequate to cure past discrimination in elementary and secondary schools, the Justices showed no interest in addressing the strategy's limits when integrating colleges and

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[139] Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 612–620 (1998).

[140] *See* Moran, *The Heirs of* Brown: *The Story of* Grutter v. Bollinger, *supra* note 15, at 452–453.

[141] *Id.* at 453.

[142] *Id.* at 452–453.

universities.[143] Predictably, without much in the way of outreach or support, black enrollments in white institutions of higher education remained low.[144]

There was not a similar complacency on the political front. President Lyndon Johnson, fresh from a landslide victory over Senator Barry Goldwater in 1964, moved decisively to consolidate his vision of the Great Society.[145] Part of that vision included the full incorporation of blacks into American life.[146] The Civil Rights Act of 1964 empowered the Court to begin vigorous enforcement of *Brown*.[147] But Johnson also was concerned about ongoing segregation in other sectors, including higher education. In 1965, he announced at Howard University that:

> [F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.
>
> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.[148]

To overcome a history of racial exclusion, Johnson promoted policies of affirmative action by executive order.[149] Although still firmly anchored in a rhetoric of remediation, Johnson's approach permitted race-conscious measures without any judicial finding of past discrimination. In the wake of civil unrest, nearly all colleges and universities responded to Johnson's invitation by adopting race-conscious admissions programs.[150]

Johnson's successor, President Richard M. Nixon, built on race-conscious initiatives during the early years of his administration. Shortly

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143 *See id.*

144 *See* JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 382–383 (2005).

145 *See* ROBERT DALLEK, FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961–1973 at 189–195 (1998).

146 *Id.* at 211.

147 WILKINSON, *supra* note 48, at 78, 102–108.

148 Lyndon B. Johnson, Commencement Address at Howard University: "To Fulfill These Rights" (June 4, 1965), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 636 (1966).

149 Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965), *reprinted in* 42 U.S.C. § 2000e (2000).

150 *See* KARABEL, *supra* note 144, at 384–392.

after his election in 1968, Nixon signed the Voting Rights Act of 1970[151] and the Equal Employment Opportunity Act of 1972.[152] In addition, he established set-asides for minority business enterprises seeking federal contracts.[153] Even so, Nixon soon saw the political advantage in condemning both busing and affirmative action as part of an appeal to America's "silent majority."[154] By the early 1970s, with four Nixon appointees on the Court, the retreat from busing and the rise of an anti-classification interpretation of *Brown* were underway.[155]

Given these developments, another question loomed: What would become of affirmative action in the face of growing protests from a not so silent majority? In higher education, the important test case was *Regents of the University of California v. Bakke*.[156] There, a disappointed white applicant, Allan Bakke, challenged the admissions practices at the University of California at Davis medical school.[157] He alleged that the school's practice of setting aside seats for underrepresented minorities was a form of "reverse discrimination" that violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause.[158] In effect, Bakke was calling on the Court to reject the executive branch's efforts to inject anti-subordination practices into higher education. If the Court acceded, it would revert to the pre-*Brown* doctrine in college admissions cases, making clear that race-conscious remedies were reserved for rectifying past institutional discrimination and that the Constitution was otherwise colorblind.

The *Bakke* case split the Court four-to-four with Powell, a Nixon appointee, as the crucial swing vote.[159] Four Justices wanted to strike down Davis's plan on the ground that Title VI's non-discrimination provision

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151 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, *amended by* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified at 42 U.S.C. § 1973aa (2000)).

152 Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e (2000)).

153 PHILIP A. KLINKNER WITH ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 293–294 (1999).

154 *See* ROBERT MASON, RICHARD NIXON AND THE QUEST FOR A NEW MAJORITY 53–54, 104 (2004); KLINKNER WITH SMITH, *supra* note 153, at 293–296.

155 Madhavi M. McCall & Michael A. McCall, *Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323, 331 (2006) (describing Rehnquist as "Nixon's fourth and final Supreme Court appointment" in 1971).

156 438 U.S. 265 (1978).

157 *Id.* at 277–278.

158 *Id.*

159 JEFFRIES, *supra* note 80, at 231, 490.

assumed that the Constitution adopted a colorblind standard and thus prohibited reverse discrimination.[160] The call for an anti-classification approach would come at a significant price, however, by disrupting well-established programs of affirmative action necessary to integrate colleges and universities.[161] Another four Justices wanted to uphold the Davis plan because race was being used to promote rather than bar minority access. They believed that benign government programs should not trigger strict scrutiny, but rather a more deferential intermediate standard of review. Under this standard, programs need only be substantially related to an important state interest to satisfy the Constitution. Because Davis's goals of remedying past societal discrimination and diversifying the medical school and the profession counted as important and because the set-aside plan substantially advanced these goals, the program passed muster.[162]

With his colleagues equally divided, Justice Powell stepped into the breach. He sought a way out of the paralyzing debate over whether to adopt an anti-classification or an anti-subordination approach in analyzing Davis's program. Although Powell agreed that racial classifications were inherently suspect and therefore triggered the most searching level of judicial scrutiny, he did not totally disallow their voluntary use by government officials as a strict anti-classification view would require.[163] Nor did he permit Davis to justify its program by invoking general societal discrimination or underrepresentation in the profession, both of which reflected an anti-subordination perspective.[164] Instead, Powell turned to the First Amendment and the tradition of academic freedom to recognize a pedagogical rationale for voluntary affirmative action, the very kind of justification that *Rodriguez* had stymied in the elementary and secondary school setting.[165] According to Powell, diversity was a compelling interest because it promoted the free exchange of ideas by nurturing an "atmosphere which is most conducive to

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[160] *Bakke*, 438 U.S. at 413–417 (Stevens, J., concurring in judgment in part and dissenting in part). Although these Justices relied on Title VI as the narrowest ground for decision, their claim that the statute was co-extensive with the Constitution signaled that colorblindness was a requirement under equal protection law, too. BERNARD SCHWARTZ, BEHIND *BAKKE*: AFFIRMATIVE ACTION AND THE SUPREME COURT 56–62, 109–118 (1988); *see also* JOEL DREYFUSS AND CHARLES LAWRENCE III, THE *BAKKE* CASE: THE POLITICS OF INEQUALITY 214–216 (1979) (noting that the Title VI analysis was one "indication" of how the Justices would decide the equal protection issue but was designed to avoid "divulging their views on the ultimate question").

[161] WILKINSON, *supra* note 48, at 302.

[162] *Bakke*, 438 U.S. at 362 (Brennan, J., concurring in judgment in part and dissenting).

[163] *Id.* at 291, 305 (Powell, J.).

[164] *Id.* at 310–311.

[165] *Id.* at 311–315.

speculation, experiment and creation."[166] Race was one of many traits that enabled colleges and universities to identify students who could draw on their backgrounds and experiences to contribute to this dialogue.[167]

Although Powell had deflected the dialectic between an anti-classification and anti-subordination Constitution, he remained deeply concerned about overreliance on race in any facet of government decision-making. As a result, he struck down Davis's plan because it set aside spaces for members of racial and ethnic minority groups, a quota system that in effect precluded whites from competing for a prescribed number of seats in the entering class.[168] To provide guidance to higher education administrators, Powell offered an example of a plan that would pass constitutional muster. Harvard's undergraduate admissions program looked at individuals in a holistic way that took into account a range of characteristics and gave special weight not just to race but also to geographic origin, musical talent, socioeconomic disadvantage, and unique personal experience, among others.[169] This approach at no point precluded applicants from competing for all of the spots in the entering class.[170] Justice Powell was comfortable that Harvard's plan would permit colleges and universities to continue using affirmative action but in a narrowly tailored way that treated each applicant as an individual.[171]

By the 1990s, however, the backlash against affirmative action had intensified, and *Bakke* seemed ripe for challenge. Critics of Powell's reasoning enjoyed an unprecedented success in 1995 in *Hopwood v. Texas*.[172] Cheryl Hopwood, a white working-class woman denied admission to the

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[166] *Id.* at 312 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)). The conceptual implications of diversity remain a lively topic of debate among academics. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *What Exactly Is Racial Diversity?*, 91 CAL. L. REV. 1149, 1153–1164 (2003) (offering competing notions of what diversity means and what purposes it serves).

[167] *Bakke*, 438 U.S. at 312–313.

[168] *Id.* at 315–316. A number of commentators have questioned whether there is any meaningful distinction between quotas and holistic review that attaches some weight to race. Indeed, even at the time *Bakke* was decided, Powell's clerks harbored serious reservations about the defensibility of the distinction. JEFFRIES, *supra* note 80, at 476–478, 484–485.

[169] *Bakke*, 438 U.S. at 315–318, 321–324.

[170] *Id.* at 318.

[171] *Id.* at 318. *See also* JEFFRIES, *supra* note 80, at 484–485 (describing how "Powell's canny instinct for public perception told him that he had much to gain by celebrating the Harvard approach").

[172] 78 F.3d 932 (5th Cir. 1996), *remanded to*, 999 F. Supp. 872 (W.D. Tex. 1998), *aff'd in part, rev'd in part*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001).

University of Texas Law School, alleged wrongful discrimination on account of her race. According to Hopwood, there were substantial disparities between the grades and Law School Admissions Test scores required of white applicants like her and those required of black and Mexican-American applicants.[173] Hopwood asserted that race pervaded the law school's admissions process with files going through separate review processes and students placed on segregated waiting lists.[174] She argued that because race was given so much weight, Texas, in effect, had implemented quotas rather than the kind of holistic, individualized review that Justice Powell envisioned.[175]

The district court found that the law school could consider race in admitting students, but that its program was not narrowly tailored because it relied on a segregated and stratified process.[176] The Fifth Circuit Court of Appeals affirmed the district court but went much further by condemning the diversity rationale in *Bakke* as illegitimate. Noting that Justice Powell wrote only for himself, the court of appeals concluded that "the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection."[177] Even though the Fifth Circuit's call for an anti-classification Constitution was a direct rebuke to Powell's reasoning, the Supreme Court declined to grant certiorari in the case, perhaps because the highly racialized particulars of the Texas admissions process made it a less than appealing forum in which to address the legitimacy of affirmative action.[178]

Instead, the Court heard challenges to admissions practices at the University of Michigan.[179] In *Grutter*, both the plaintiffs and the Michigan law school defendants were content to frame the claims as a referendum on *Bakke*. The plaintiffs wanted the Court to embrace an anti-classification approach as the Fifth Circuit had done in *Hopwood*, while Michigan wanted

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[173] *Hopwood*, 78 F.3d at 936–937.

[174] *Id.* at 937–938.

[175] Hopwood v. Texas, 861 F. Supp. 551, 553 (W.D. Tex. 1994), *rev'd by* 78 F.3d 932 (5th Cir. 1996).

[176] *Hopwood*, 861 F. Supp. at 578–579.

[177] *Hopwood*, 78 F.3d at 944.

[178] Texas v. Hopwood, 518 U.S. 1033, 1033 (1996). The brief concurring opinion by Justice Ruth Bader Ginsburg, in which Justice David Souter joined, suggested significant discomfort with the mechanics of the Texas admissions policy, which no party to the case appeared to defend on appeal. *Id.*

[179] Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

to preserve the constitutional legitimacy of Powell's diversity rationale.[180] Only a group of student-intervenors rejected this framework as an evasion that itself was a betrayal of *Brown*'s legacy. They believed that the challenge to affirmative action presented "a choice between two traditions in American life and law: the tradition of *Plessy v. Ferguson* and the tradition of *Brown v. Board of Education*."[181] The student-intervenors impugned the call for an anti-classification Constitution as a "perverse, indeed racist, view of equality" that reverted to *Plessy*'s vision of a "separate but equal" society.[182] They also took the law school to task for condoning a diversity rationale that did little to address structural inequality and institutional racism.[183] The student-intervenors wanted the Court to revitalize *Brown* and thus revive "[t]he tradition of mass mobilization and progressive legal action" in the struggle against racial subordination.[184]

Justice Sandra Day O'Connor did not take up the student-intervenors' invitation to treat the Michigan litigation as an indictment of racial injustice in America. Instead, she treated *Grutter* as an opportunity to revisit *Bakke*, and she adopted Justice Powell's approach by choosing the middle way. O'Connor's opinion in *Grutter* refused to endorse a pure anti-classification Constitution, even if racial classifications remained suspect and so triggered the highest level of judicial scrutiny. Yet, she also sidestepped the dangerous political terrain historically associated with an anti-subordination principle by limiting the justifications for affirmative action in admissions to promoting diversity and democratically legitimate leadership.[185] Though carefully circumscribed, O'Connor's opinion sat uneasily with the school desegregation cases, which increasingly rejected race-conscious measures except as a remedy for state-sponsored discrimination. Admittedly, the Court had not yet rejected voluntary desegregation plans when *Grutter* was decided, so the law was at least technically consistent. But even that semblance of consistency would be sorely tested by the decision in *Parents Involved.*

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[180] Moran, *The Heirs of* Brown*: The Story of* Grutter v. Bollinger, *supra* note 15, at 461.

[181] Defendant-Intervenor's Brief in Support of Defendants' Motion for Summary Judgment and in Opposition to the Plaintiff's Motion for Summary Judgment at 1, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-CV-75928), available at 2000 WL 35575808.

[182] *Id.* at 24–25.

[183] *Id.* at 6–8, 26–27, 28–35, 38.

[184] *Id.* at 13.

[185] Moran, *The Heirs of* Brown*: The Story of* Grutter v. Bollinger, *supra* note 15, at 478–480, 481–485.

B. *The Contestation over Culture-Race and the Colliding Logics of Diversity and Desegregation*

The distinct logics of diversity and desegregation collided in *Parents Involved*. This collision in turn reflected the uneasy relationship between race and ethnicity in the Court's jurisprudence on race. These tensions have augured the possibility of culture-race but also have made it difficult for the Justices to elaborate a consistent theory of the concept. Consider, for example, Professor Ian Haney López's critique of Powell's opinion in *Bakke*. Haney López has argued that *Brown* was about race, while the diversity rationale was not. Reflecting the way in which the recognition of culture-race often devolves into a clash between race and ethnicity, Haney López insists that Powell invoked the image of a "nation of minorities" in *Bakke* so that he could substitute a particular conception of ethnicity for race. As a result, his opinion equated the histories and experiences of a range of groups, including blacks, European immigrants, Japanese Americans, and Mexican Americans.[186]

According to Haney López, Powell's turn to ethnicity treated groups as standing on an equal footing in the political process. If this were true, Haney López contends, Powell should have rejected strict scrutiny as no longer necessary to police abuses of minorities. Because he was unwilling to embrace an intermediate standard of review, however, Haney López argues that Powell added a gloss to his account of ethnicity. In particular, he "relied on a specific version of ethnicity theory, one that depicted racial subordination as over while simultaneously presenting whites as vulnerable minorities."[187]

Haney López takes a dim view of Powell's reliance on this theory of ethnicity, arguing that the diversity rationale betrayed *Brown*'s legacy by laying the groundwork for "reactionary colorblindness."[188] Far from leading to a flexible approach to questions of discrimination and inequality, Haney López asserts, *Bakke*'s account of a "nation of minorities" necessarily converged with formal-race because "these notions work hand in hand to produce a racial ideology capable of claiming that racism is a thing of the past, that group inequality reflects cultural capacity, and that whites are vulnerable minorities."[189] For Haney López, *Brown* embraced an anti-subordination Constitution that treats race as "a socially and legally produced hierarchical system structurally embedded in U.S. society."[190] To the extent

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[186] Haney López, *supra* note 134, at 1035–1036.

[187] *Id.* at 1043.

[188] *Id.* at 990, 1034, 1043.

[189] *Id.* at 1029.

[190] *Id.* at 990.

that *Bakke* (and later *Grutter*) diverged from this view, the cases already had defeated *Brown*; the *Parents Involved* decision just made it official.

Although the higher education cases clearly do adopt a distinct logic from the school desegregation decisions, Haney López's provocative account of Justice Powell's turn to ethnicity in *Bakke* must be tempered by several observations. For one thing, Powell himself probably would not have described his thinking in this way. He reportedly was torn between his distaste for permanent programs of affirmative action and his belief that it was "too late in the day" to outlaw them. Indeed, Powell feared that any effort to do so would be "a disaster for the country"[191] and ordered his law clerk to "find a middle ground."[192] The diversity rationale appealed to Justice Powell because it avoided the harshness of invalidating affirmative action under a strict anti-classification approach, while it averted the difficulties of measuring comparative disadvantage to determine which groups deserved compensation under an anti-subordination approach.[193] Powell was convinced that his middle way would allow college and university administrators to focus on problems of underrepresentation without permanently institutionalizing quota systems.[194]

Even if a non-white identity was treated as one trait among many, it is unlikely that a long-time Virginian like Powell considered it truly on a par with white ethnicity. On the contrary, his biographer John C. Jeffries, Jr. writes that:

> For Powell, as for many white southerners, the progression from *Brown* to *Bakke* brought a revolution in announced conviction, an about-face in articulated belief. Yet remnants of old attitudes survived. Justice Powell still had a gentleman's sense of responsibility for the less fortunate and a southerner's instinct for paternalism toward blacks. No southerner could readily deny that blacks needed help, as the excesses of the past and the region were too familiar to ignore. The upper-class sense of noblesse oblige and the southerner's assumption of white control and responsibility conspired to the same conclusion: Racial justice required racial preference.[195]

In short, under Jeffries' account, Powell may have been influenced as much by his sense of southern obligation as by any emerging theory of a "nation of minorities." Indeed, this underlying ambivalence about race could explain why his vision of ethnicity in *Bakke* was incompletely realized.

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[191] JEFFRIES, *supra* note 80, at 469.

[192] *Id.* at 473.

[193] *Id.* at 475.

[194] *Id.* at 475–476.

[195] *Id.* at 470–471.

Of course, it is entirely possible that whatever Powell's private intentions, his analysis in *Bakke* ultimately had the impact that Haney López describes. If so, it is surprising that advocates of colorblindness in *Hopwood* and *Grutter* went to considerable lengths to discredit the diversity rationale by characterizing it as nothing but Powell's "lonely" opinion. In fact, the very idea that racial identity is malleable, contingent, and thus germane to the exchange of ideas necessarily undermines the view that race is ascribed, fixed, and irrelevant. So, it should come as no surprise that formalists who advocate colorblindness also studiously eschew any consideration of the sociology of race and ethnicity in contemporary America. For them, a dynamic vision of culture-race is simply out of bounds as a constitutional matter.

Among the most notable proponents of a formalist approach to race are the Justices who joined Roberts' plurality opinion in *Parents Involved.* Chief Justice Roberts and Justice Samuel Alito are relatively new to the Court, but both Antonin Scalia and Clarence Thomas have written about their commitment to formalism and an anti-classification Constitution.[196] Scalia has argued that judges normally must abide by a common-sense reading of textual provisions.[197] To consider demographics and social context is to invest judges with substantial discretion to make law as they go along.[198] According to Scalia, judge-made law subverts the democratic process because the clear meaning of a text, whether constitutional or statutory, can be revised on a case-by-case basis.[199] He concludes that "attacking the enterprise [of interpretation] with the Mr. Fix-it mentality of the common-

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[196] *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and the Law*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23–25, 38–47 (1997); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L.REV. 1175, 1177–1180 (1989); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5–7 (1996); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 594–596 (1990); Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 691, 700–703 (1987).

[197] Scalia has made clear that he would sometimes deviate from this approach when the results would otherwise be intolerable. So, even if the notion of cruel and unusual punishment did not extend to public flogging at the time the Eighth Amendment was adopted, Scalia would declare such a sanction unconstitutional today. For that reason, he describes himself as a "faint-hearted" originalist. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–862, 864 (1989).

[198] *Id.* at 862–863; Scalia, *The Rule of Law as a Law of Rules*, *supra* note 196, at 1177–1180.

[199] SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 196, at 10–11, 13 (1997).

law judge is a sure recipe for incompetence and usurpation."[200] Yet, it is precisely this sensitivity to context that is essential to an understanding of culture-race. Because diversity draws on this concept, context is critical to both Powell's opinion in *Bakke* and O'Connor's opinion in *Grutter*.

These context-specific decisions are anathema to Scalia. In his view, "The Equal Protection Clause epitomizes justice more than any other provision of the Constitution. And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well."[201] Instead, clear neutral principles can be gleaned from a common-sense reading of the text of the Fourteenth Amendment itself: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[202] At no point does this language distinguish among individuals on the basis of race; for Scalia, the language is race-neutral and this alone is decisive.[203] Given his distaste for textual embellishments, it is hard to see him being influenced by any theory of ethnicity espoused by Justice Powell in *Bakke* and affirmed by Justice O'Connor in *Grutter*. Instead, for Scalia, affirmative action is discrimination pure and simple because the text of the Fourteenth Amendment says so.[204]

Justice Clarence Thomas has embraced originalism since his arrival on the Supreme Court.[205] Thomas wants to be true to the drafters' original intent, so in addition to the text, he examines evidence regarding legislative history to interpret a provision's meaning. He grounds this inquiry in a regime of natural law rights, which he believes is embedded in the form of government created by the Founders.[206] Although his reasoning is different from Scalia's in some respects, Thomas also concludes that the Constitution is colorblind and condemns the official use of racial classifications.[207] Far

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200 *Id.* at 14.

201 Scalia, *The Rule of Law as a Law of Rules*, *supra* note 196, at 1178.

202 U.S. CONST. amend. XIV, § 1.

203 *See, e.g.*, Richmond v. J. A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring) ("The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, 'created equal,' who were discriminated against.").

204 Antonin Scalia, Commentary, *The Disease as the Cure: "In Order to Get beyond Racism, We Must First Take Account of Race,"* WASH. U. L.Q. 147, 148 (1979) (describing Powell's diversity rationale as "an historic trivialization of the Constitution" because of the flimsy pretense used to "overcome the presumption against discrimination by race").

205 ANDREW PEYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 474 (2001).

206 SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 103–104 (1999).

207 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240–241 (1995) (Thomas, J., concurring).

from embracing any sociological theory of ethnicity to bolster his views, Thomas has openly criticized *Brown* for relying on social science evidence to document black inferiority and condone racial paternalism.[208] Again, he seems unlikely to be swayed by any theory of ethnicity proposed in *Bakke* and elaborated in *Grutter*.

Finally, despite Haney López's indictment of the insidious impact of Powell's theory of "a nation of minorities," ethnicity is not apt to be a stable and monolithic concept any more than race is in the Court's jurisprudence. Just as anti-classification and anti-subordination rationales have splintered race into versions that are formal, status-based, and historical, the contestation over culture-race, expressed as tensions between race and ethnicity in equal protection law, is likely to destabilize both concepts. In fact, multiple notions of ethnicity have haunted equal protection law just as various definitions of race have.

Historian David Gutierrez has observed that ethnicity has at least two meanings: one that involves "primordial, immutable, preconscious aspects of a group's social identity (or sense of peoplehood)" and one that consists of "mere[] strategies for pursuing group interests in society and comprises, therefore, situational, circumstantial, or optional components of individual and group identity."[209] Haney López worries that because Powell defined ethnicity as something other than peoplehood, the concept subverted race and led inevitably to "reactionary colorblindness." When ethnicity is treated as a form of primordial peoplehood, it takes on the ascribed, fixed qualities associated with images of race that have dominated the Court's equal protection jurisprudence. As a consequence, ethnicity is subsumed within the debate over an anti-classification or anti-subordination Constitution.[210] For example, when Chinese and Latino parents challenged court-ordered busing, the Court found that they were victims of past discrimination and so must benefit from desegregation remedies, whether or not they wanted the cure. In these cases, the Court treated ethnicity as a race-like form of peoplehood and

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[208] Missouri v. Jenkins, 515 U.S. 70, 120–123 (1995) (Thomas, J., concurring); GERBER, *supra* note 206, at 79.

[209] DAVID G. GUTIERREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 7 (1995). I do not mean to suggest that Gutierrez's dichotomy is exhaustive of the ways that the courts have used the term "ethnicity," but the distinction is a valuable starting point. Indeed, it would be quite useful to create a comprehensive taxonomy of ethnicity comparable to Gotanda's taxonomy of race. *See* Gotanda, *supra* note 103, at 4.

[210] *See* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1294–1296 (2002) (questioning the conflation of race and ethnicity for blacks as well as other racialized groups).

so dismissed any notion that it could reflect a dynamic set of strategic interventions to maximize group interest.[211]

When ethnicity becomes strategic and dynamic, however, it collides with reified notions of race in ways that expose the limits of the debate over the anti-classification and anti-subordination Constitution. With respect to an anti-classification approach, the recognition of ethnicity undercuts biological accounts of race by allowing room for the possibility of culture-race. If, in fact, race like ethnicity reflects socially contingent practices, formalism is no longer equivalent to neutrality. In the area of language, for example, official English mandates clearly disadvantage racial and ethnic groups that speak other tongues. The government may justify these mandates in the name of nation-building or economic mobility, but whatever the rationale, these policies are by no means neutral in allocating burdens and benefits among groups that command very different linguistic resources.[212] This observation in turn casts doubt on the assertion that colorblindness operates as a neutral principle if groups similarly find themselves arrayed along a racial hierarchy with very different histories, traditions, and resources.[213]

As for anti-subordination, an acknowledgment of ethnicity demonstrates the limits of equating assimilation with full inclusion.[214] Justice Scalia once remarked that "In the eyes of government, we are just one race here. It is American."[215] In doing so, he captured the notion that there is a single, homogenous national identity that each individual must master. Yet, Walt Whitman's image of America as a "nation of many nations" suggests a different model, one in which distinct cultural practices, often associated with race and ethnicity, persist and even flourish.[216] Under this view, to the extent that members of racial and ethnic groups must sacrifice their language and culture to participate meaningfully in American life, they are neither truly free nor entirely equal.[217]

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211 *See supra* notes 115–117 and accompanying text.

212 WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 115 (1995).

213 *See* Vilna Bashi, *Racial Categories Matter Because Racial Hierarchies Matter: A Commentary*, 21 ETHNIC & RAC. STUD. 959, 963, 965 (1998) (observing that "[r]acial categories tell us about racial hierarchies" and that racialization "comes down to a question of power").

214 *See* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2008 (2000); Rodriguez, *supra* note 112, at 145–149.

215 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

216 Walt Whitman, *Song of Myself*, *in* LEAVES OF GRASS 40 (M. Cowley ed., 1959).

217 *See supra* notes 110–113 and accompanying text.

With only a limited place for culture-race in the Court's jurisprudence, there have been few ways to talk about how race and ethnicity can be voluntary and involuntary at the same time. A subordinated status is unchosen, and it can impede the realization of a professed national ideal, whether it be colorblindness or respect for diversity.[218] This gap between the ideal and the real in turn can be grist for the development of the social practices and attitudes that comprise culture-race.[219] As groups deploy strategies to alter their circumstances, members' racial and ethnic self-presentation will shift to reflect new challenges and opportunities.[220] Despite the fluidity of identity, there are some enduring lessons about the complexities of culture-race: Race is neither static nor irrelevant, nor is it a feature of American life that can be eradicated. So long as the real falls short of the ideal, everyone will belong to America in different ways. The government can not assume the stance of a disinterested bystander in the quest to live up to collective aspirations, nor will the marginalized passively await their moment of uplift and redemption. In the end, government's task is to ensure a level playing field through norms of mutual respect as diverse groups pursue these evolving conceptions of culture-race.[221]

Whatever the shortcomings of the diversity rationale as an elaboration of the concept of culture-race, the Justices at least have engaged this idea in higher education decisions. By contrast, before *Bakke* was decided, the Court had consigned culture-race to irrelevancy in its elementary and secondary school cases. In *Lau v. Nichols*, for instance, the Court relied on an interpretation of Title VI that recognized Chinese-speaking students' claims only because the San Francisco school district had used language as a proxy to discriminate on the basis of race, ethnicity, or national origin.[222] This analysis did not acknowledge how language could play an affirmative role in constituting a child's identity. In fact, this line of argument previously had been dismissed when the Court refused to exempt Chinese students from a busing decree based on a desire to preserve their linguistic heritage.[223] In

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218 Larry L. Naylor, *Culture and Cultural Groupings*, *in* CULTURAL DIVERSITY IN THE UNITED STATES 12–14 (Larry L. Naylor ed., 1997).

219 *See, e.g.*, GUTIERREZ, *supra* note 209, at 7–8 (describing how Mexican-Americans shifted from a primordial identity to situational ethnicity in response to discrimination in the United States).

220 Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 770 (1994); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992).

221 Gotanda, *supra* note 103, at 66–67.

222 414 U.S. 563, 563 (1974).

223 Lee v. Johnson, 404 U.S. 1215, 1215 (1971). For a fuller discussion of these issues, see Rachel F. Moran, *A New Twist on "The One Best System": Structured*

both cases, the Justices treated ethnicity as fungible with race; each was an ascribed characteristic relevant only when it became the basis for discrimination.

Lau was decided one year after *Rodriguez*, and the *Rodriguez* Court's rejection of any fundamental right to education effectively foreclosed claims that the district was obligated to accommodate language differences so that Chinese-speaking students could prepare themselves to participate in the workforce and in civic life.[224] As a consequence, language and culture could not be linked to norms of belonging and respect for difference that had to be incorporated into the classroom as a microcosm of a pluralistic society. Strategic choices about linguistic and cultural identity would be grist for the local political process, but only transgressions against a primordial peoplehood would count in court. Despite the tremendous significance of the public schools in socializing children, a role recognized in *Brown*, the Court left no room for culture-race in its desegregation jurisprudence.

Even if Powell's particular theory of ethnicity in *Bakke* is a limited one, his intuition that freedom is as much at stake as equality in achieving racial justice is an important one.[225] The unlinking of freedom and equality in school desegregation cases has led to a regrettably effete discourse about race. In *Parents Involved*, for example, although the Louisville and Seattle school districts invoked diversity, they did not fully embrace the rich complexity of culture-race. Because the districts appropriated the rhetoric of diversity without fully engaging its complexity, the plurality expressed bewilderment at the plans' definitions of success:

> Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/non-white terms in Seattle and black/"other" in Jefferson County. . . . [U]nder the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but

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Immersion Initiatives, Equal Opportunity, and Freedom to Learn, in MULTILINGUAL MATTERS (Grace P. McField ed.) (forthcoming) (arguing that the analogy between race and language limited the Court to focusing on egregious exclusion of English language learners akin to state-mandated segregation).

224 Moran, *supra* note 114, at 129–130.

225 Of course, freedom also was a significant part of the rhetoric of racial justice used by the civil rights movement to achieve the victory in *Brown* and to press for its implementation. For descriptions of freedom rides, freedom schools, and freedom summers, see generally SANDRA ADICKES, THE LEGACY OF A FREEDOM SCHOOL (2005); SALLY BELFRAGE, FREEDOM SUMMER (1965); DOUG MCADAM, FREEDOM SUMMER 66–115 (1988); JAMES PECK, FREEDOM RIDE 114–153 (1962); Mary Aickin Rothschild, *The Volunteers and the Freedom Schools: Education for Social Change in Mississippi*, 22 HIST. OF EDUC. Q. 401 (1982); Len Holt, *Freedom Schools*, 9 S. EXPOSURE 42 (1981); Daniel Perlstein, *Teaching Freedom: SNCC and the Creation of the Mississippi Freedom Schools*, 30 HIST. OF EDUC. Q. 297 (1990).

> no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is "broadly diverse."[226]

As these Justices noted, both districts modeled their voluntary plans on desegregation precedents that presumed a binary racial world. In Louisville, that world was either black or not; in Seattle, that world was either white or not. Under neither plan did the school district fully account for other traits, like language or culture, in promoting a norm of equal respect as well as the autonomy to develop a distinct identity.

The experiences in Louisville and Seattle demonstrate that a notion of culture-race, with its corresponding focus on freedom and flexibility, does not fit readily into a desegregation jurisprudence that characterizes race as either fixed and irrelevant or entrenched and stigmatizing. A narrow focus on equality has permitted the Roberts plurality in *Parents Involved* to equate an anti-classification perspective with neutral treatment. Formal equality is dispositive, regardless of the impact on a child's freedom to learn and prepare for life in a diverse society. At the same time, advocates of an anti-subordination Constitution like Justice Breyer can tacitly equate this approach with assimilation. By failing to offer a meaningful account of diversity in the classroom, the dissent has potentially allowed the pursuit of equality to trump the freedom to preserve distinct identities in a multiracial, multiethnic world. Even though a majority of the Justices are now prepared to recognize diversity as a compelling interest at the elementary and secondary level, the stilted translation of diversity from *Bakke* and *Grutter* to the classrooms of Louisville and Seattle is cause for concern. Any recognition of schools as a place to build complex, flexible, and dynamic identities has been hampered by the rigid dialectic between an anti-classification and an anti-subordination Constitution, a dialectic that in turn has reified race.

For those who believe that the Constitution must adapt to changing conditions, the Court's neglect of culture-race, often achieved by pitting race against ethnicity, is deeply troubling. *Brown* and the desegregation cases looked backwards to a world largely defined as black and white in which the color line could not easily be crossed. *Bakke* and the affirmative action cases surveyed a multiracial, multiethnic landscape that complicated any notion of a monolithic color line. Haney López insists that in the face of demographic complexity, Powell's model of ethnicity led away from race and inexorably

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[226] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2754 (2007) (Roberts, C.J., plurality) (citations omitted).

to reactionary colorblindness.[227] Yet, this critique of Powell's approach should not be understood as an indictment of culture-race itself. Whatever the imperfections of the *Bakke* opinion, culture-race can create a positive, autonomous space for identity-building in a world no longer organized along oppositional, binary racial lines.

IV. THE UNEVEN MARCH TO COLORBLINDNESS: COMPARTMENTALIZED EQUAL PROTECTION LAW

A jurisprudence of fragmentation is by no means unique to education law. Indeed, compartmentalization and inconsistency pervade equal protection law. Each context—whether it be school desegregation, affirmative action in higher education, government contracting, or voting rights—permits a different tale to be told about the Court's evolving doctrine of race and equality. In some instances, the tale is one of the march to colorblindness, but in others it is not. Here, I want to complicate Haney López's account of Powell's turn to ethnicity as an element of civil rights retrenchment by telling two very different tales, one about government contracting and the other about voting rights. Although the contracting decisions show that Powell's particular conception of ethnicity can play a part in undoing race-conscious remedies, voting rights law demonstrates that fluid notions of culture-race can give these remedies new life.

A. *Affirmative Action and Diversity: For Academics Only*

The Court has adopted distinct approaches to voluntary affirmative action in higher education and government contracting. Shortly after *Bakke* was decided, the Justices upheld a federally mandated set-aside program for public works projects in *Fullilove v. Klutznick*.[228] In response to changing demographics, Congress recognized a number of disadvantaged groups, including not only blacks but also "American Indians, Spanish-Americans, oriental Americans, Eskimos, and Aleuts" who have "been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage."[229] The bill's proponents believed that discrimination played a key role in the low rates of minority participation in public works projects, and congressional concern with rectifying past wrongs became the focus of the *Fullilove* opinion.[230] Relying on legislative history, the Court found that the program's supporters sought

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[227] Haney López, *supra* note 134, at 1034.

[228] 448 U.S. 448, 449 (1980) (citation omitted).

[229] *Id.* at 464.

[230] *Id.* at 463.

to "direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus. . . ."[231] Federal action was necessary because "a number of factors, difficult to isolate or quantify, seemed to impair access by minority businesses to public contracting opportunities."[232]

Although there were no legislative findings of intentional wrongdoing akin to what would be required for remediation in a court of law, the *Fullilove* majority accepted an inference of discrimination based on historical and contemporary patterns of differential access to public works contracts.[233] Noting Congress's special role in promoting equal protection under the Fourteenth Amendment, the Court applied a more relaxed standard of review than strict scrutiny.[234] As a result, Congress did not have to "act in a wholly 'color-blind' fashion"[235] to redress inequality and exclusion.[236] Although some innocent non-minority firms were burdened by the set-aside, the Court noted that the program did not seek to "confer a preferred status upon a nondisadvantaged minority or to give special assistance to only one of several groups established to be similarly disadvantaged minorities."[237] Instead, "Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities."[238]

Fullilove's receptivity to a program that rectified underrepresentation for a range of groups without fine-tuned findings of comparative disadvantage might seem consonant with Powell's approach to affirmative action in *Bakke*. However, in a separate concurrence, Powell went out of his way to distinguish the two cases. Reflecting his concerns about permanent programs of affirmative action, he was at pains to point out that strict scrutiny applied to all racial classifications, whether the set-asides were places in the class at Davis medical school or awards of public works contracts.[239] He made clear that he would not approve of voluntary programs of affirmative action that relied on set-asides except in extraordinary circumstances.

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231 *Id.* at 459.

232 *Id.* at 461.

233 *Id.* at 477–480.

234 *Fullilove*, 448 U.S. at 472–473, 480–481.

235 *Id.* at 482.

236 *Id.* at 482–483.

237 *Id.* at 485.

238 *Id.* at 485–486.

239 *Id.* at 496 (Powell, J., concurring).

Having observed that "[u]nlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problems of discrimination in our society,"[240] Powell emphasized that Congress had greater latitude to redress general patterns of unequal access than Davis did.[241] *Fullilove* therefore was narrowly limited because

> [T]he issue here turns on the scope of congressional power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments. In this case, where Congress determined that minority contractors were victims of purposeful discrimination and where Congress chose a reasonably necessary means to effectuate its purpose, I find no constitutional reason to invalidate [the set-aside program].[242]

By carefully limiting the diversity rationale in *Bakke* to its facts, Powell displayed what constitutional scholar Cass Sunstein has termed a minimalist philosophy and what Justice Scalia might refer to more caustically as common-law, Mr. Fix-It constitutionalism. Under the minimalist approach, judges decide "one case at a time," and they carve out compromises by rendering decisions on grounds that "leave open the most fundamental and difficult constitutional questions."[243] In doing so, the Justices can reach agreement on particular results, even when confronting complex questions like affirmative action that provoke deep and divided views on the Court and among the citizenry.[244]

Sunstein describes two key commitments of minimalism. First, decisions should be narrow rather than wide. That is, "[t]hey decide the case at hand; they do not decide other cases too, except to the extent that one decision necessarily bears on other cases . . . ."[245] Second, the decisions are shallow not deep; in this way, Justices can achieve consensus about concrete outcomes, even when there is no agreement about the meaning of abstract

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240 *Fullilove*, 448 U.S. at 499 (Powell, J., concurring).

241 *Id.* at 499–506 (Powell, J., concurring).

242 *Id.* at 516–517 (Powell, J., concurring).

243 *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 5 (1999). Some scholars have criticized Sunstein's account of minimalism as excessively vague and thus not falsifiable. However, these critiques have used the concepts of narrowness and shallowness to give some concrete meaning to minimalism as a method of deciding cases. Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1957–1966 (2005).

244 SUNSTEIN, *supra* note 243, at 5; *see also* Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

245 SUNSTEIN, *supra* note 243, at 10.

fundamental principles like equal protection.[246] In *Fullilove*, for instance, Powell chose to limit his analysis to the situation confronting Congress when it addressed problems in government contracting, and he justified the set-aside not upon some grand, unified theory of racial justice but on special congressional powers to rectify discrimination. Meanwhile, lest there be any misunderstanding about the scope of his novel theory of diversity, he confined *Bakke*'s precedential value to the realm of higher education with its unique history of academic freedom and dedication to the exchange of ideas.

One cost of a minimalist approach is the fragmentation that results as cases are decided in contingent and provisional ways. The concept of culture-race often is implicated by the Court's efforts to grapple with the relationship between race and ethnicity, and the compartmentalization of precedents can impede recognition of this dynamic interplay. In particular, by confining the diversity rationale to higher education cases, the Justices can revert to reified notions of race elsewhere in the jurisprudence of equality. This is precisely what happened in *City of Richmond v. J.A. Croson Co.*[247] By the time this case was decided in 1989, the Court had become seriously divided about the legitimacy of set-aside programs in government contracting. In writing for the majority that struck down this type of program in the construction industry, Justice O'Connor employed some of the techniques for compromise used by her friend and mentor, Justice Powell.[248]

Because the Richmond City Council had adopted the plan in *Croson*, she distinguished away the *Fullilove* precedent because it was based on congressional powers of remediation under the Fourteenth Amendment.[249] O'Connor analogized city council members in *Croson* to university administrators in *Bakke*;[250] neither group of officials had any special competency or authority to rectify general societal discrimination. Unlike university administrators, however, the council members could not defend their program by drawing on a tradition of academic freedom and the need to promote diversity. To institute a set-aside plan, city officials instead had to identify with particularity patterns of discrimination within the

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[246] *Id.* at 11–13.

[247] 488 U.S. 469 (1989). For the story behind the *Croson* case, see Reginald Oh & Thomas Ross, *Judicial Opinions as Racial Narratives: The Story of* Richmond v. Croson, *in* RACE LAW STORIES, *supra* note 15, at 381.

[248] Lyle Denniston, *The Center Moves, the Center Remains*, 40 N.Y.L. SCH. L. REV. 877, 891–892 (1996); Sandra Day O'Connor, *A Tribute to Lewis F. Powell, Jr.*, 56 WASH. & LEE L. REV. 3, 6 (1999).

[249] *Croson*, 488 U.S. at 489–491.

[250] *Id.* at 495–497.

municipality's jurisdiction.[251] O'Connor concluded that the factual record was insufficient to sustain the plan.[252]

Professor Haney López argues that O'Connor deployed Powell's notion of a "nation of minorities" in *Bakke* to conclude that the black majority on the city council wielded unchecked authority and therefore could "too easily act to the disadvantage of a [white] minority based on unwarranted assumptions or incomplete facts."[253] In his view, by dismissing the set-aside plan as nothing but "simple racial politics," she "followed . . . Powell down the ethnic road" yet nonetheless refused to allow the political process to operate freely.[254] According to Haney López, any genuine faith in a "nation of minorities" would have required the Court to defer to a pluralistic political process in which all groups could fairly compete.[255] Instead, the Court continued to apply strict scrutiny, emphasized the end of racism and the rise of white vulnerability, and engaged in "reactionary colorblindness."[256]

Although O'Connor cited *Bakke* to support the application of strict scrutiny, she did not draw on the imagery of a "nation of minorities" rooted in ethnicity to evaluate the set-aside requirement. On the contrary, she found that Richmond remained a city rooted in binary racial politics of a black-white nature. The set-aside provision included a range of groups, but O'Connor pointed out that if the evidence of past discrimination was weak with respect to blacks, it was wholly lacking with respect to "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. . . . It may well be that Richmond has never had an Aleut or Eskimo citizen."[257] The inclusion of a laundry list of beneficiaries in turn cast doubt on the bona fides of the plan: "The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination."[258] What had been a virtue of inclusiveness in *Fullilove* became a vice of overbreadth in *Croson*.

For O'Connor, Richmond was a city comprised of blacks and whites, and the mention of other groups in the set-aside plan was mere window dressing to camouflage the raw exercise of power. As the dominant political group, blacks could engage in "simple racial politics" that led to stigma,

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[251] *Id.* at 491–492.

[252] *Id.* at 505.

[253] Haney López, *supra* note 134, at 1048 (quoting *Croson*, 488 U.S. at 495–496).

[254] *Id.* at 1050.

[255] *Id.* at 1063.

[256] *Id.* at 1043, 1046–1051.

[257] *Croson*, 488 U.S. at 506.

[258] *Id.*

stereotyping, and overreaching. This characterization of municipal officials suggested the kind of solidarity and oppositional politics associated with a fear of "reverse discrimination" rather than with a "nation of minorities." O'Connor's interpretation meant that there was no contest between race and ethnicity in *Croson*; culture-race could have no place in her analysis of the Richmond plan. In that sense, *Croson* looks very different from *Crawford*, where Justice Powell took precisely the hands-off approach to politics that Haney López suggests is a natural outgrowth of the relativism inherent in *Bakke*'s conception of ethnicity.[259] In assessing the validity of the statewide ballot measure that halted court-ordered busing to remedy de facto segregation, Powell emphasized the multiracial, multiethnic nature of the electorate and the broad support that the proposition received among a range of racial and ethnic groups.[260] None of these features figured in O'Connor's analysis of *Croson*.

One year later, the Court decided *Metro Broadcasting, Inc. v. Federal Communications Commission*, which upheld a federal licensing program that gave a plus to broadcast stations owned by minorities.[261] The Federal Communications Commission, drawing on the *Bakke* rationale, justified the policy as a way to include underrepresented groups and promote diversity on the airwaves.[262] Writing for the majority, Justice William Brennan relied on *Fullilove* to conclude that Congress had special powers to remedy patterns of exclusion, so that a less stringent standard of review applied than the strict scrutiny used in *Croson*.[263] Based on the reasoning in *Bakke*, Brennan concluded that broadcast diversity was, at the very least, an important First Amendment interest that could justify the licensing program.[264] Under an intermediate level of scrutiny, the minority ownership policies passed muster because they were substantially related to achieving this goal.[265] Here, the Court seemed once again to open the door to culture-race by recognizing that diversity in the media can alter the quality of exchanges on the air waves.

Metro Broadcasting's effort to transplant the diversity rationale to government contracting did not survive for long. Only five years later, in *Adarand Constructors, Inc. v. Pena*,[266] the Court held that strict scrutiny should apply to congressional set-aside programs just as it does to state and

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259 Haney López, *supra* note 134, at 1063.

260 *See supra* text accompanying notes 129–134.

261 497 U.S. 547, 566 (1990), *overruled in part by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

262 *Id.* at 554–556.

263 *Id.* at 563–566.

264 *Id.* at 566–568.

265 *Id.* at 569–600.

266 515 U.S. 200 (1995).

local initiatives.[267] The Court, in an opinion by Justice O'Connor, repudiated the relaxed level of review in *Metro Broadcasting* as "undermin[ing] important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years."[268] Although O'Connor went to some lengths to point out that Powell's separate concurrence in *Fullilove* had presumed that strict scrutiny applied to federal affirmative action programs,[269] she was largely silent about his diversity rationale in *Bakke* and how it fit with longstanding principles of equal protection. Instead, she simply remanded *Adarand* so that a lower court could determine whether strict scrutiny was satisfied.[270] Even though *Adarand* did not expressly overrule the use of diversity to justify race-conscious contracting, this rationale largely disappeared from the Court's affirmative action jurisprudence with the exception of decisions involving higher education.[271]

Why was it so difficult for diversity to find any traction as a justification for affirmative action outside of colleges and universities? Why, in other contexts, did the Court suspect that "simple racial politics" led to the rigidification of race, rather than to dynamic interchange? When diversity was used to defend the special treatment of a designated list of beneficiaries in the broadcasting industry, the set-aside program raised the specter of a permanent racial spoils system, the very consequence that Powell had dreaded and strove mightily to avoid in *Bakke*.[272] To that end, he had carefully coupled the diversity rationale with Harvard's individualized review policy. In effect, the narrow tailoring requirement became diversity's tether, leading to very different results in higher education and government contracting.

Powell saw only a limited sphere in which the Constitution could account for the dynamism of culture-race. When quotas were used, he thought of race as once again a reified biological irrelevancy wrongly deployed for political ends. As a result, culture-race had little role to play outside higher education. After all, it is hard to imagine many arenas in which constituencies vying for recognition and rewards will be satisfied with

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[267] *Id.* at 227.

[268] *Id.* at 231.

[269] *Id.* at 235.

[270] *Id.* at 237–239.

[271] Michelle Adams, *Stifling the Potential of* Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1, 88 B.U. L. REV. 937, 944–945 (2008).

[272] For a characterization of the set-aside for broadcasting licenses as a racial spoils system, see Alan J. Meese, Bakke *Betrayed*, 63 LAW & CONTEMP. PROBS. 479, 492–493 (2000).

an amorphous promise of holistic review. Instead, interest groups seek the sort of categorical preferences, that is, set-asides, that the Court has rejected except when past discrimination is established.[273] Culture-race becomes an insupportable justification because the Court fears that quota systems will intensify racial divisions rather than create a space for the development of racial identities. So, diversity remains the province of higher education, where traditions of academic freedom and individual merit insulate administrators from the most direct pressures to set aside seats.

Given the Justices' resistance to using diversity to justify other forms of affirmative action, it is not surprising that Chief Justice Roberts could readily dispense with *Grutter* by declaring it inapplicable to elementary and secondary schools in *Parents Involved*.[274] What is more surprising is that five Justices, the four dissenters and Justice Kennedy, were willing to recognize diversity as a compelling interest in the voluntary desegregation litigation.[275] Although there was not much in-depth discussion on the point, these Justices apparently believed that the learning process is not different in kind at the elementary, secondary, and post-secondary levels and that there is significant value in creating diverse classrooms at all levels of instruction.[276] By translating the diversity rationale to the desegregation context, a majority of the Court recognized expressive and associational aspects of the common school, a discourse that had largely disappeared after the *Rodriguez* decision. Unfortunately, however, the ongoing dialectic between the anti-classification and anti-subordination Constitution left little room to develop a theory of culture-race that could sustain the voluntary integration plans in Louisville and Seattle as essential to advancing the interest in a diverse student body.

As a result, narrow tailoring became diversity's tether once again. The dissent was willing to accept the school boards' findings that any harms associated with voluntary desegregation plans were substantially outweighed by the benefits of an integrated classroom, but Justice Kennedy was unwilling to defer to these political judgments. In particular, he did not

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[273] *See* Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 909 (1987) (describing a program of minority set-asides in government contracting as likely to be the product of special-interest politics).

[274] *See supra* note 22 and accompanying text.

[275] *See supra* note 54 and accompanying text.

[276] Several of the amicus briefs filed in the case went to some lengths to make this argument based on social science evidence of the benefits of learning in a diverse student body. *See, e.g.*, Brief for The American Psychological Association and the Washington State Psychological Association as Amici Curiae Supporting Respondents at 10–22, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915); Brief of Professors Amy Stuart Wells, et al. as Amici Curiae in Support of Respondents at 8–29, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915).

believe that Louisville and Seattle had developed systems of holistic review, nor did he seem sanguine that busing plans ever would approximate the kind of nuanced assessments associated with admission to Harvard's undergraduate program or Michigan's law school.[277] Faced with highly reified notions of race in school desegregation law, Kennedy would have to turn elsewhere for doctrinal guidance on how to create spaces that foster identity and expression without infringing on individual rights.

B. *The Uncertain March to Color-Consciousness: Voting Rights and Justice Kennedy's Redistricting Strategies in* Parents Involved

One possible source of guidance for Kennedy was the Court's voting rights jurisprudence. As the Justices retreated from race-conscious remedies in school desegregation, their use persisted in elections, despite similar judicial debates over an anti-classification and an anti-subordination Constitution. I leave for another day the complicated question of why these two areas have evolved differently, although congressional reaffirmation of the Voting Rights Act coupled with the Court's reluctance to overturn legislative judgments about how to constitute the body politic clearly have played a part.[278] Voting has been characterized as a fundamental right, and the Court's "one-person, one-vote"[279] mandate offers a highly individualized, race-neutral account of equality.[280] Yet, there is no doubt that the way votes are aggregated plays a critical role in shaping the nature of political representation and the perceived legitimacy of the electoral process.[281] The Court has entered the thicket of redistricting only with great trepidation, and

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277 *See supra* note 55 and accompanying text.

278 *See, e.g.*, Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1848–1853 (1992) (noting that Congress, as part of its response, took the important step of incorporating empirical evidence of racial polarization into the requirements for establishing a claim of second-generation discrimination based on vote dilution due to racial gerrymandering); Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L.J. 1, 18–19 (2006) (describing strong congressional reaction to the Court's narrow interpretation of Voting Rights Act protections in a 1982 decision).

279 Reynolds v. Sims, 377 U.S. 533, 576 (1964); *see also* Baker v. Carr, 369 U.S. 186, 187–188 (1962) (addressing vote dilution in apportionment that led to significant disparities in the proportion of representatives to voting populations).

280 Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1652–1653 (1993).

281 *Id.* at 1652–1655; Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1676–1691 (2001).

the Justices clearly prefer bright-line rules that avoid charges of favoritism and the anti-democratic exercise of judicial power.[282]

Advocates of an anti-classification Constitution have attacked race-conscious redistricting as tantamount to impermissible racial gerrymandering.[283] Yet, taken to its logical conclusion, such reasoning would imply that the dictates of the Voting Rights Act, like school desegregation decrees, have outlived their usefulness. Presumably, the Court has been unwilling to go this far, lest it provoke a direct confrontation with Congress.[284] Moreover, the evidentiary rules in voting rights cases offer ongoing proof that race still matters in the electoral process. In particular, evidence of racially polarized voting patterns—that is, that blacks choose black candidates and whites choose white candidates—is treated not as a set of irrelevant private preferences but as verification of the need for remedial intervention.[285]

In marked contrast, choices to live in segregated neighborhoods are not deemed proof that school desegregation efforts remain imperative because of racially polarized residential patterns. Nor are such patterns an element of defining violations in school desegregation cases.[286] Ironically, these very different approaches to incorporating racial preferences into equal protection law seem to reinstate the Court's purportedly discredited distinction between political and social equality. In endorsing the doctrine of "separate but equal." *Plessy v. Ferguson* treated full political participation as a

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[282] Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 MISS. L.J. 271, 282–283 (1995); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1095–1096 (1991); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself?: Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1520–1521 (2002).

[283] Shaw v. Reno, 509 U.S. 630, 636 (1993). Later, the Court backed away somewhat from this anti-classification approach. *See* Dan Tokaji, *Representation and Raceblindness: The Story of* Shaw v. Reno, *in* RACE LAW STORIES, *supra* note 15, at 497, 534–539.

[284] The Court may have been chastened by Congress's strong reaction to a 1980 plurality decision that required plaintiffs to prove discriminatory purpose in a voting dilution case. Mobile v. Bolden, 446 U.S. 55, 66 (1980) (Stewart, J., plurality). For a description of the congressional reaction, see Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 747–750 (1983). The Court also retreated from a colorblind approach to redistricting a decade later in the wake of the *Shaw v. Reno* decision. *See* Tokaji, *supra* note 283, at 534–539.

[285] Thornburg v. Gingles, 478 U.S. 30, 56 (1986).

[286] For a description of the unsuccessful struggle to link school and residential segregation patterns in the *Milliken* litigation, see Nathaniel R. Jones, *The Judicial Betrayal of Blacks—Again: The Supreme Court's Destruction of the Hopes Raised by* Brown v. Board of Education, 32 FORDHAM URB. L.J. 109, 120–124 (2004).

constitutionally protected value but dismissed efforts to enforce social equality through race-mixing.[287] Today, this dichotomy is subtly reinstated: Polarized voting patterns during elections command the Court's attention as a barrier to authentic political representation, but racialized choices about real estate are considered a purely private, social matter outside the scope of constitutional concern.

To deflect demands for colorblindness in the area of electoral politics, proponents of race-conscious remedies have invoked not just historical-race and status-race but also culture-race. Because changing patterns of voting by racial and ethnic groups are relevant to defining a violation, these efforts have enjoyed some success. At first, the Voting Rights Act targeted minority exclusion and underrepresentation by eradicating racial barriers to the individual exercise of the franchise.[288] Later, however, the Act recognized voting and representation as expressive activities, ones that not only reflect preferences and beliefs but also shape them. The second generation of voting rights cases therefore addressed how district lines are drawn and votes are counted, once individuals can cast their ballots freely.[289] This shift moved from a focus on race-neutral access to the ballot box to a preoccupation with how race influences both the quality of representation and the experience of political participation.[290] Redistricting litigation did not treat race as a fixed and presumptively irrelevant trait. Instead, identity—including racial identity—was considered fluid and dynamic, the product of both structured opportunities and individual experiences. As a result, second-generation voting rights cases began to make room for the possibility of culture-race.

Consider, for instance, the current debates over whether the Voting Rights Act requires majority-minority districts that establish safe seats for minority candidates. Over the years, voting patterns have changed, so that in some areas, thirty percent of white voters in a Democratic primary reliably cross over to support a minority candidate. In heavily Democratic districts with possibilities for multiracial political coalitions, a minority candidate may have an excellent chance of winning even if minorities comprise only a plurality of the voting population. Under these circumstances, majority-

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[287] The court of appeals in *Milliken* worried that a failure to recognize the connections between housing patterns and school segregation in metropolitan Detroit would raise the specter of *Plessy* and put *Brown* in peril. Bradley v. Milliken, 484 F.2d 215, 249 (6th Cir. 1973) (en banc), *rev'd*, 418 U.S. 717 (1974).

[288] Guinier, *supra* note 282, at 1093.

[289] *Id.* at 1093–1095.

[290] Pildes, *supra* note 282, at 1571–1572; Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 39–45 (2003).

minority districts arguably concentrate minority voters unnecessarily and reduce the total number of representatives they can elect.[291]

The total number of minority officeholders is one benchmark of success under the Voting Rights Act, but some legal scholars have moved beyond this purely quantitative approach. In fact, sensitivity to culture-race requires a focus on the quality of representation and how it will reflect and shape group identity. For example, Michael Kang has argued that majority-minority districts allow racial constituencies to confront their internal heterogeneity and can gradually diminish presumptions that all members are best served by voting as a block.[292] Coalitional districts, on the other hand, require the plurality of minority voters to act as a cohesive group to ensure election of a minority candidate.[293] The result may be coalitions that entrench the in-group solidarity of non-whites and perpetuate their racially polarized voting patterns, even as whites become more willing to vote across racial lines.[294]

Terry Smith also contends that coalitional districts alter the nature of minority representation.[295] Because non-white officials must constantly woo cross-over white voters, Smith argues that the representation of minority constituents is diluted by the perennial need for compromise.[296] If Kang and Smith are right, coalitional districts may not be preferable to majority-minority districts on qualitative grounds. Minorities are less free to express their differences because they must vote as a racial block, while white voters retain flexible identities that allow them to cross over or not, depending on the candidate.

Until 2007, when the Court decided *LULAC v. Perry*,[297] Justice Kennedy had largely ignored questions of culture-race in voting rights cases.[298] In *LULAC*, Kennedy voted to strike down a redistricting plan because it diluted the Latino vote.[299] In reaching this conclusion, he acknowledged both the changing political identity and internal heterogeneity of Latinos in Texas.[300] Kennedy first noted that some Latinos were mobilizing to unseat a Latino

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[291] Pildes, *supra* note 282, at 1529–1539.

[292] Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 781–787 (2008).

[293] *Id.* at 797–800.

[294] *Id.* at 798.

[295] Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261, 294 (2005).

[296] *Id.* at 293.

[297] LULAC v. Perry, 548 U.S. 399 (2006).

[298] Heather K. Gerken, *The Supreme Court, 2006 Term: Comment: Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 109 (2007).

[299] *LULAC*, 548 U.S. at 427–435.

[300] *Id.* at 432–435.

incumbent because of increasing dissatisfaction with his representation.[301] Kennedy did not want redistricting to reify the Latino vote by presuming that a Latino incumbent automatically served Latino interests, particularly when the evidence was strongly to the contrary.[302] Kennedy also observed that the newly created district, designed to protect the incumbent, lumped together Latinos with very different interests and concerns.[303]

Kennedy was convinced that Latinos living near the border were politically distinct from those living in Austin, a state capital several hundred miles north.[304] He rejected a redistricting plan that bleached out these differences by treating Latinos as a homogeneous constituency.[305] He also expressed dismay that just as Latinos in the southern part of the state were poised to exercise their political clout, they were thwarted by the redrawing of district lines.[306] He feared that redistricting was being used to deter political expression and participation of an emboldened and emerging constituency.[307] For all of these reasons, he found a violation of the Voting Rights Act.[308]

Elsewhere, Heather Gerken has argued that *LULAC* influenced Kennedy's decision in *Parents Involved*.[309] He did seem to have Texas on his mind, having cited *Bush v. Vera*,[310] another voting rights lawsuit from the Lone Star State, to support the application of strict scrutiny to voluntary school desegregation.[311] But his preoccupation did not end there. In *LULAC*, Kennedy relied on First Amendment freedoms of association and expression to countenance race-conscious decision-making that was respectful of racial difference but did not succumb to stereotypes about a monolithic Latino identity.[312]

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301 *Id.* at 423–424, 440–441.

302 *Id.* at 428–429.

303 *Id.* at 428–429, 435.

304 *Id.* at 424, 434–435.

305 *LULAC*, 548 U.S. at 435.

306 *Id.*

307 *Id.* at 438–439.

308 *Id.* at 435, 442.

309 Gerken, *supra* note 298, at 105–107. In an article published before the *Parents Involved* decision, Professor Goodwin Liu argued that the redistricting cases were more relevant than affirmative action cases in the Louisville and Seattle litigation and that the Court's voting rights jurisprudence supported the use of race-conscious student assignment plans. Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277, 301–307 (2007). Justice Kennedy clearly took a different view of the narrow tailoring issue.

310 517 U.S. 952 (1996).

311 *Parents Involved*, 127 S. Ct. at 2792 (2007).

312 *LULAC*, 548 U.S. at 435, 438–442.

In *Parents Involved*, Kennedy also was receptive to race-consciousness in the structuring of opportunities to participate, this time in public schools.[313] Kennedy wanted school boards to be able to build common schools by fostering diversity and reducing racial isolation. In doing so, Kennedy "not only acknowledge[d] race's associational and expressive dimensions, but show[ed] some awareness of the relationship between the two—the possibility that the choices the state makes in grouping individuals will affect the choices individuals make in expressing their identity."[314] Kennedy seemed especially concerned that interracial tolerance and understanding would be difficult to learn in segregated environments, whether they were the product of state action or private residential choices.[315]

Drawing on his experience with crafting remedies for electoral wrongs, Kennedy embraced race-neutral treatment of individuals, just as the first generation of voting rights cases did. For this reason, he rejected the student assignment plans in Seattle and Louisville. At the same time, though, Kennedy endorsed the legitimacy of race-consciousness in structuring opportunities to participate, just as the second-generation vote dilution decisions did. To that end, he allowed race to be a factor in aggregating children when school boards draw attendance boundaries or choose sites for new schools.[316]

Whether a strategy modeled on voting rights will work for voluntary school desegregation remains to be seen. For most voters, the boundaries of an electoral district are an abstraction encountered once a year. But the boundaries of a neighborhood are part of a concrete, lived experience. Residential areas become sites of ordinary, everyday practices that define and entrench the cultural identifications associated with race. Segregated neighborhoods figure among the most profound spaces in which culture-race is made, even if school desegregation cases have treated them as largely beyond the law's reach.[317] It seems unlikely that an occasional school siting or redistricting decision will disrupt deeply rooted patterns of residential segregation, particularly when decades of court-ordered desegregation remedies have not. Indeed, one recent, albeit controversial, study suggests

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313 Gerken, *supra* note 298, at 112–117.

314 *Id.* at 120.

315 *Id.* at 115–116.

316 *See supra* notes 53–55 and accompanying text.

317 MARY C. WATERS, ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA 97–101 (1990) (describing the role of residential segregation in creating ethnic neighborhoods that influence individual identity); *see also* CHARLES TILLY, IDENTITIES, BOUNDARIES, AND SOCIAL TIES 213–214 (2005) (describing the role of cultural ecology in identity politics); KIAN TAJBAKHSH, THE PROMISE OF THE CITY: SPACE, IDENTITY, AND POLITICS IN CONTEMPORARY SOCIAL THOUGHT 179 (2001) (noting that social differentiation and juridical boundaries "organize some identities in, and some out").

that even in residential areas that are diverse, interchange and cooperation across racial and ethnic lines will not take place without affirmative efforts to build a common experience of community.[318]

Regardless of whether Kennedy's strategy succeeds, however, his opinion has served the valuable function of reintroducing the concept of culture-race into the school desegregation arena. In doing so, he shows that despite Haney López's grim prognosis regarding Justice Powell's ethnicity turn, a focus on culture-race need not lead to reactionary colorblindness or even to judicial laissez-faire. In fact, recognizing culture-race offers a potential way out of the gridlock associated with endless debates over the anti-classification and anti-subordination Constitution. By acknowledging the ways in which group identity is fluid and flexible, the Court can begin to consider how public spaces should be structured to promote freedom of expression and association on terms of equality, civility, and respect.[319]

CONCLUSION

The *Parents Involved* decision starkly reveals the limitations of a jurisprudence of fragmentation. The Court's desegregation doctrine has been hamstrung by a longstanding battle over whether *Brown* enshrines a Constitution dedicated to enforcing formal equality or to eradicating racial stratification. *Bakke* and *Grutter* employ a different logic, one that treats diversity as a means to promote identity-formation, personal expression, and interpersonal knowledge. Under this rationale, race is not a rigid absolute but a culturally inflected, contextual trait. Because of the distinct logics underlying the desegregation and affirmative action cases, however diversity could not be readily translated to an arena that has long treated race as either a biological irrelevancy or a marker of inequality.

Only Justice Kennedy made some room for a different approach to race–at least at the margins of school board decision-making. What remains to be seen is whether a recognition of culture-race can restore the full promise of *Brown*'s legacy by demonstrating that race is not simply a product of biology or history over which we have no control. Instead, race is a fluid trait integrally shaped by the choices we make today. *Parents Involved*, by overturning voluntary integration plans, has taken us further down a path of

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[318] Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century: The 2006 John Skytte Prize Lecture*, 30 SCAND. POL. STUD. 137, 146–151, 164–165 (2007).

[319] *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 213–216 (1989); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 122–127; Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, *supra* note 111, at 303, 340–357, 361–377.

racial reification and rigidity. Yet, even a fleeting glimpse of a more dynamic vision of race reminds us that we can and must do better.